Supreme Court, U.S.
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In The

Supreme Court of the United States

KEVIN P. O'NEILL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether installing in a private home a mechanical device that is capable of recording private conversations requires judicial approval before it is installed?

A. Does federal law allow law enforcement agents to decide when and where such a device will be installed and to withhold from a court, asked to authorize the interception of private conversations, that a surreptitious entry and bugging of a private home already occurred?

2. Whether, when government agents violate the Fourth Amendment by installing and monitoring an eavesdropping device in a private home without prior judicial approval, the Government is obligated to prove its agents did not benefit, directly or indirectly, from their unconstitutional monitoring?

A. Is remand necessary because neither the District Court nor the Court of Appeals considered whether law enforcement agents benefited from their unconstitutional conduct by selecting Petitioner's home, rather than another site, because the agents knew, before they requested judicial approval, that there was an illegally installed, and fully operational, mechanical device already in place in Petitioner's home?

THE PARTIES TO THE PROCEEDINGS

The parties in the Appellate Court proceedings in the Seventh Circuit included Petitioner, Kevin O'Neill, and Carl Warneke, David Kadlec, Leslie J. Jensen, Robert A. Kruppstadt, Randall Miller, Richard Mroch, Harvey Powers, and James Schneider. See *United States v. Warneke*, 310 F.3d 542 (7th Cir. January 10, 2003).

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is included in the Appendix to this Petition and is reported as amended at *United States v. Warneke*, 310 F.3d 542 (7th Cir. 2003).

The opinions of the United States District Court for the Eastern District of Wisconsin are included in the Appendix to the Petition. They are reported at *United States v. O'Neill*, 27 F.Supp.2d 1121 (E.D. Wis. 1997), and at *United States v. O'Neill*, 52 F.Supp.2d 954 (E.D. Wis. 1999). Another opinion was not published but is included in the Appendix. In addition, two prior appeals are reported at *United States v. Warneke*, 199 F.3d 906 (7th Cir. 1999) and *United States v. Powers*, 168 F.3d 943 (7th Cir. 1999); they are not at issue here.

JURISDICTION

The United States District Court for the Eastern District of Wisconsin had jurisdiction based on 18 U.S.C. § 3231. Petitioner O'Neill was found guilty and was sentenced on December 22, 2000. He filed a timely notice of appeal, and the United States Court of Appeals had jurisdiction based on 18 U.S.C. § 1291.

The United States Court of Appeals for the Seventh Circuit decided Petitioner's case on November 12, 2002. Petitioner filed a Petition for Rehearing that was denied on January 10, 2003. An amended opinion was filed on the same day. *United States v. Warneke*, 310 F.3d 542 (2003).

Petitioner timely invokes this Court's jurisdiction based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. §§ 2510-2518

§ 2510. Definitions

As used in this chapter –

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than –

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when – . . .

§ 2512. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who intentionally –

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication or disseminates by electronic means any advertisement of –

(i) any electronic, mechanical, or other device knowing the content of the advertisement and knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire, oral, or electronic communications, knowing the content of the advertisement and knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce, shall be fined under this title or imprisoned not more than five years, or both.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the

offense as to which the application is made, when such interception may provide or has provided evidence of – . . .

§ 2518. Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause

to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that –

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the

place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

* * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

50 U.S.C. § 1801

§ 1801. Definitions

* * *

As used in this subchapter:

(f) "Electronic surveillance" means –

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy.

STATEMENT OF THE CASE

On June 10, 1997, Petitioner, Kevin O'Neill, was charged in a multi-count indictment with racketeering and related offenses. On October 19, 1998, the District Court dismissed the indictment because the Government agents did not comply with 18 U.S.C. § 2517(5). The District Court ordered the defendants released, but stayed the order for 30 days. *United States v. O'Neill*, 27 F.Supp.2d 1121, 1128 (E.D. Wis. 1997).

A superseding indictment was issued on November 10, 1998, charging Petitioner with the same offenses. On June 15, 2000, a federal jury convicted Petitioner of the charged offenses. *United States v. Warneke*, 310 F.2d 542 (7th Cir. 2003). Petitioner is currently incarcerated.

This Petition deals solely with the Government's use of taped recorded conversations that were secured after agents installed an electronic eavesdropping device in Petitioner's home, without first obtaining proper authorization from the Attorney General and without a court order. The relevant facts are not in dispute.

On November 11, 1994, Government agents enlisted the services of Patricia Wolf as a paid informant. (App., at 120-123). She provided information on the Stateline chapter of the Outlaws Motorcycle Club, also known as the American Outlaws Association (AOA). (App., at 120, 121). She was in daily contact with the lead case agent, Sandra DeValkenaere, and with Detective Gary Govekar, a Lake County Illinois Deputy Sheriff. (App., at 120-123). The Informant, her husband, David Wolf, and Harvey Powers,

both AOA members, shared a home in Racine, Wisconsin. *Id.*

In December, 1994, DeValkenaere gave the Informant mechanical eavesdropping devices, which were installed in specially modified phones, and placed within the Wolf/Powers home with the Informant's consent. (App., at 120). By December 20th, the agents tested and retained the capacity to seize oral communications from within the Wolf/Powers residence at their discretion. *Id.* The agents did not secure a Title III eavesdropping order for the Wolf/Powers residence until January 5, 1995. (App., at 123-125).

On January 9, 1995, the agents gave the Informant two matching lamps, one containing a mechanical eavesdropping device ("a bug"). While visiting the Wolf/Powers residence in late January, 1995, Petitioner expressed an interest in the lamps. (App., at 120, 121). This information was relayed to Agent DeValkenaere, who then devised a plan to install a bugged lamp either in Petitioner's home or the Outlaws' clubhouse. (App., at 120-124).[1]

Another lamp, identical to the ones already in the Wolf/Powers residence, was assembled and shipped to Agent DeValkenaere within a few days. *Id.* The new bugged lamp was given to the Informant and on February 7, 1995, Petitioner was given one of the bugged lamps and he took it to his home. (App., at 121-123). The lamp was put into a storage room. (App., at 123). The agents did not

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[1] Agent DeValkenaere testified as follows:

Q. And that bug was placed within the home without permission of the court; you didn't ask permission of the court to place that bug there, did you?

A. No.

Q. Did you feel that you had to ask permission before you placed the bug in the house?

A. No. (April 29, 1999, R. 1099:90-91).

know where Petitioner placed the lamp, so they attempted to locate it by using an electronic monitoring apparatus. *Id.*

At first their attempts to locate the lamp failed, so DeValkenaere devised a plan to gain entry into Petitioner's home.[2] (App., at 122, 123). The Informant was instructed to go to Petitioner's home and pretend that she was interested in obtaining information regarding a business run by Petitioner's girlfriend. *Id.* Once inside, the Informant inquired about the lamp, and she was told it was in storage. *Id.* The Informant removed the lamp from storage and plugged it in near Petitioner's office in his home. *Id.*

Starting on March 2nd, the agents monitored the location of the lamp several times each day. Eighteen days later, on March 20, 1995, the Government, for the first time, requested under federal law a Title III eavesdropping order for Petitioner's home.[3] (App., at 123-125). In their application for the Title III order, the law enforcement agents did not disclose to the District Court that they had already surreptitiously installed a bugged lamp in Petitioner's home. *Id.* The Title III order was issued on March 20th, and the agents began recording conversations immediately. They did not replace the bugged lamp nor did they have to alter it in any way.

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[2] The Government conceded that the Informant was the only way they could gain entry into Petitioner's home. (R.1099:116). The Government also anticipated the Informant would soon be entering into the Witness Protection Program, which she did on March 12, 1995.

[3] Even though the bugged lamp was in place and working, the government's Title III application requested authorization "to make all necessary surreptitious and/or forcible entries to effectuate the purposes of [the] Court's Order, including entries to install . . . electronic listening devices." (R.100: 167-168).

THE LOWER COURT PROCEEDINGS AND RULINGS ON THIS ISSUE

In the District Court, Petitioner moved to suppress the Title III recordings made from the bugged lamps in his home and in the Wolf/Powers residence. (*O'Neill*, 27 F.Supp.2d at 1130). He maintained that the agents violated Title III, and the Fourth Amendment, by installing and monitoring the whereabouts of the lamp without judicial authorization. *Id.* Additionally, he maintained that the agents were listening to his conversations prior to court authorization. *Id.*

The District Court concluded that the "government violated O'Neill's right to privacy when it began monitoring the microwave transmissions from the listening device without first obtaining a Title III order." (App., at 31). The District Court, however, held that Petitioner had not met his burden of proving the agents benefited from their prior illegal conduct. *Id.*

Petitioner filed additional motions on issues relating to Title III, and on April 7, 1999, the District Court granted Petitioner an evidentiary hearing. (App., at 115). The hearing was limited to one issue: Could Petitioner prove that the agents listened to conversations prior to the March 20th Title III order. (App., at 89-92). After the evidence was presented, the magistrate was not "persuaded" that Petitioner had met "his burden." (App., at 135-137). The District Court adopted the magistrate's findings and held that:

> "[I]n the end the defendants may have faced an impossible task in striving to prove that the agents wrongfully listened to conversations without authorization, because without external manifestations of the eavesdropping, the defendants cannot prove what information existed in the minds of the government agents and when that information existed."

In the Seventh Circuit, Petitioner maintained that the agents violated the Fourth Amendment and Title III by

installing and monitoring the bugged lamp before they requested judicial approval. According to Petitioner, the burden was on the Government to prove the agents did not benefit, directly or indirectly, from their illegal conduct. Since the District Court placed the burden on Petitioner, he maintained that the misallocation of the burden of proof required, at a minimum, a further hearing. In addition, Petitioner maintained that the agents benefited from their illegal conduct. They targeted Petitioner's home for the Title III order, rather than some other site, because they knew the bugged lamp was already installed there and it was fully operational.

With respect to Title III, Petitioner maintained that an unauthorized installation of a fully activated eavesdropping device violates Title III. He asserted that the installation in a private home of any mechanical device that is "primarily useful" to surreptitiously record conversations is governed by Title III. He further maintained that his private conversations were illegally intercepted from the moment the bugged lamp in his home was operational.

The Seventh Circuit declined to rule on the Fourth Amendment issue and held that the monitoring that occurred, before the Title III order was lawfully obtained, was not used in the Title III application. (App., at 3-5). Therefore, according to the Seventh Circuit, the alleged Fourth Amendment violation did not illegally taint the probable cause determination. (App., at 4, 5). The Seventh Circuit then went on to hold that Title III did not apply because a mechanical eavesdropping device that is temporarily used as a tracking device is not governed by Title III. *Id.*

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE SEVENTH CIRCUIT'S DECISION CAUSES A CONFLICT AMONG THE CIRCUITS ON ISSUES OF NATIONAL IMPORTANCE, CREATES AN UNJUSTIFIED INCONSISTENCY WITH RESPECT TO TITLE III'S CORE DEFINITIONS, AND BECAUSE THE SEVENTH CIRCUIT'S HOLDING UNDERMINES TITLE III'S MOST FUNDAMENTAL POLICY.

INTRODUCTION

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides Government agents with an important investigative tool, the right to use electronic eavesdropping equipment in complex criminal cases. 18 U.S.C. §§ 2510-2520. Congress, however, carefully circumscribed the use of this extraordinarily invasive investigative procedure. *United States v. Giordano*, 416 U.S. 505, 515 (1974). Advance approval from the Attorney General, or other high-ranking officials in the Justice Department, and the express authorization of a District Court are required before federal agents may install an eavesdropping device. *Id.* Until Petitioner's case, all of the circuit courts of appeal agreed on this point. By taking a position that is in direct conflict with the other circuits on the most fundamental provisions of Title III, the Seventh Circuit leaves Title III adrift in uncertainty.

In a deceptively simple sentence[4] the Seventh Circuit nullified Title III's most fundamental policy, caused multiple conflicts among the circuits, and left Title III with

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[4] " . . . until interception begins, a bug is nothing but a 'tracking device' under 18 U.S.C. § 3117(b). See also 18 U.S.C. § 2510(12)." *United States v. Warneke*, 310 F.3d 542, 545 (7th Cir. 2003).

internally inconsistent definitions of its most basic terms. Review by this Court is necessary to resolve the conflict between the Seventh Circuit and the other courts of appeal on the meaning and scope of Title III, to preserve the integrity of Title III's core principles, and to ensure its most basic terms have one national definition.

A. REVIEW IS NECESSARY TO RESOLVE A CONFLICT BETWEEN THE SEVENTH CIRCUIT AND THE OTHER CIRCUITS WITH RESPECT TO THE PLAIN LANGUAGE OF TITLE III AND TO ENSURE THAT THE MOST ELEMENTAL PROVISIONS OF TITLE III ARE GIVEN INTERNALLY CONSISTENT DEFINITIONS.

1.

The Seventh Circuit's holding requires review by the Court because it creates a conflict among the circuits with respect to Title III's most fundamental terms. This conflict is certain to cause unnecessary confusion, and it will call into question many complex criminal and post-9/11, national security investigations. These conflicts ought to be reviewed in the context of this case, rather than waiting until a terrorist prosecution raises the same conflicts.

As defined in Section 2510(5), an eavesdropping device is any mechanical device that "can be used" to intercept oral communication.[5] Section 2512(1)(b) defines it as any mechanical device that is "primarily useful for" surreptitious recording. These definitions focus on what

[5] See also S. Rep. No. 1097, 90th Cong. 2d Sess. 94-95, reprinted in 1968 U.S. Code Cong. and Ad. News 2112, 2183 – defining an eavesdropping device by its primary or intended use.

the mechanical device "can be used for" or what its "primary use" is, not on ex post, self-serving claims by agents that they did not use the device for its intended purpose.[6]

Title III is unambiguous on this point.[7] Only the Seventh Circuit differentiates exempt tracking devices from nonexempt eavesdropping devices by asking how the agents claim they used the equipment, rather than what its intended or primary use is.[8]

United States v. Splawn, 982 F.2d 414 (10th Cir. 1992) aptly illustrates this conflict between the circuits. The defendants in *Splawn* were charged with violating Section 2512(1)(b) of Title III. They were selling satellite television descramblers. The defendants maintained that the descramblers were not eavesdropping devices as defined by Section 2510(4) of Title III because they had legal uses. The Tenth Circuit, however, held that Title III is concerned with the device's primary intended use (its design); not whether, apart from its design, it could be used legally. A device is prohibited, if its design renders it "primarily useful for the purpose of" surreptitious interception of conversations. *Id.*, at 417.

The same conclusion was reached in *United States v. Bast*, 495 F.2d 138 (D.C. Cir. 1974). There, the defendants were charged with violating Title III as a result of their advertisements for miniature recording devices. They too claimed the devices were exempt from Title III since they

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[6] A device "does not fall outside the ambit of the statute merely because it may have innocent [exempt] uses." *United States v. Pritchard*, 745 F.2d 1112, 1123 (7th Cir. 1984).

[7] "The language of § 2512 is like that of § 2511 clear and unambiguous. A device is illegal under either . . . if its design renders it primarily useful for surreptitious interception" of communications. *United States v. Shriver*, 989 F.2d 898 (7th Cir. 1993).

[8] But see *Pritchard*, *supra*, 745 F.2d at 1121 (applying an objective test that asked what the primary use of the apparatus was rather than how the agents claim they used it).

had innocent uses. But the District of Columbia Court of Appeals properly held that "the mere fact that a device may be used for interceptions that do not violate" Title III does not mean the device itself is exempt from Title III. *Id.*, at 143. Title III covers any mechanical device that "is primarily useful for the purpose of secret interception. . . ." *Id.*

In another Section 2512 prosecution involving the use of television descramblers, the Eighth Circuit held that "the crucial test is whether the design of the device renders it primarily useful for surreptitious listening." *United States v. Davis*, 978 F.2d 415, 419 (8th Cir. 1992); see also S. Rep. No. 1097, 90th Cong. 2d Sess. (1968).

Further, illustrating the uniform course of decisions among the other circuits, the same conclusion was reached by the Fifth Circuit in *United States v. Harrell*, 983 F.2d 36, 38 (5th Cir. 1993), and by the Eleventh Circuit in *United States v. Herring*, 993 F.2d 784, 786 (11th Cir. 1993).

The Seventh Circuit, therefore, takes a position that is in direct conflict with the other circuits and with the plain language of Title III, which defines an eavesdropping device by examining its primary intended use. 18 U.S.C. § 2510(5). In short, the Seventh Circuit's holding creates a conflict with the holdings of the Tenth Circuit in *Splawn*, the District of Columbia Circuit in *Bast*, the Eighth Circuit in *Davis*, the Fifth Circuit in *Harrell*, and the Eleventh Circuit in *Herring*.

Given the privacy interests that are at stake when government agents employ eavesdropping devices, a uniform and objective test for determining what is, and what is not, an eavesdropping device is essential. Petitioner's case provides a perfect vehicle to resolve this conflict on an increasingly important Title III issue that affects criminal and national security issues in this post-9/11 period.

2.

The Seventh Circuit's decision also causes a series of conflicts with the other circuits on related issues involving Title III's definition of "intercept." Section 2510(4) defines "intercept" as the "aural or other acquisition" of a communication. 18 U.S.C. § 2510(4). The Seventh Circuit, without explanation or analysis, imposed an additional listening requirement as an essential element of Title III's definition of "intercept." But "listening" is not mentioned in the plain language of Section 2510(4). That, however, did not dissuade the Seventh Circuit from unjustifiably holding that Title III is now not violated until listening begins. *Warneke*, 310 F.3d at 545.

Echoing George Orwell, the Seventh Circuit, but only the Seventh Circuit, believes that installing a fully-activated listening device in a private home, without judicial authorization as mandated by Title III, and monitoring its location, in violation of the Fourth Amendment, is "good police work." *Warneke*, 310 F.3d at 545.

Had the agents engaged in the same conduct in the Ninth Circuit, they would have been subject to indictment and conviction for violating Title III under *United States v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978). There, a local sheriff and one of his lieutenants were prosecuted for violations of Section 2511(a) and (b) of Title III. They suspected that another officer was engaged in criminal conduct. A tiny recorder was placed in a briefcase in his office, which was not in a secluded or private area. The "office doors were open" and a "records clerk worked fifteen feet away. . . . " *McIntyre*, 582 F.2d at 1224. The recorder was only in the office for forty-five minutes and no conversations were recorded. Nevertheless, the sheriff and his lieutenant were properly convicted of violating Title III. The Ninth Circuit held that Title III requires approval from the Justice Department and from a judicial officer before a listening device may be installed, even if no conversations are actually recorded. Cf. *Peavy v. WFAA-TV*, 221 F.3d 158, 178 (5th Cir. 2000).

Similarly, in *United States v. Padilla*, 520 F.2d 526 (1st Cir. 1975), the First Circuit suppressed tape recordings made after a listening device was installed in a private hotel room. The Government maintained that the agents only recorded conversations that took place between the defendant and one of the investigating agents. Since the agents could themselves testify to anything the defendant said in their presence (*United States v. White*, 701 U.S. 745, 28 L.Ed.2d 453 (1971)), the Government saw no harm resulting from the unauthorized bugging of the room.

The First Circuit did not accept the Government's "no harm, no foul" reading of Title III. If Government agents are allowed to install eavesdropping devices "for lengthy periods of time without antecedent authority . . . a room or an entire hotel could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur." *Padilla*, 520 F.2d at 528.

Title III mandates antecedent authority before agents install a bug (*Giordano*, 416 U.S. 515-16), rather than after they have decided what, if anything, they want to disclose about the illegal bugging. Thus, *Padilla* applies a prophylactic rule requiring suppression of all evidence, when agents prematurely install a listening device in a private residential area. See also *United States v. Shabazz*, 883 F.Supp. 422 (D. Minn. 1995).

Neither *Padilla* nor *McIntyre* are reconcilable with the ruling here. If the privacy concerns of Title III are not implicated until listening begins, as the Seventh Circuit held, then the sheriff did not violate Section 2512 in *McIntyre*. By the same token, if Title III's policy trusts agents to turn themselves in when they violate Title III, as the Seventh Circuit held it does, the agents in *Padilla* did nothing wrong and the conversations they recorded should have been admitted. *Padilla* and *McIntyre* represent a vastly different view of Title III than the one the Seventh Circuit described in Orwellian terms in Petitioner's case.

Padilla, however, is criticized as going too far. The Eleventh Circuit in *United States v. Yonn*, 702 F.2d 1341 (11th Cir. 1983) held on similar facts that *Padilla* was wrongly decided. Although *Yonn* was decided as a Fourth Amendment case, the Eleventh Circuit's reasoning is equally applicable to Title III. *Padilla* and *Yonn*, therefore, represent a clear split among the circuits. Petitioner's case only serves to fracture further the courts of appeal on this nationally important issue.

Yonn falls between *Padilla* and Petitioner's case. According to the Seventh Circuit, recorded conversations between private individuals in Petitioner's home were admissible, even though no government agents were physically present during the conversations. In that respect, the Seventh Circuit goes far beyond the limited holding in *Yonn*. The Court in *Yonn* only admitted tapes of conversations between an agent and the defendant. None of the tapes at issue here involve conversations between Petitioner and a government agent.

At the same time, the Seventh Circuit's decision is the polar opposite of the First Circuit's holding in *Padilla*. There, the court held that any evidence secured after an illegal Title III installation must be suppressed. Even conversations between a Government agent and the defendant are not admissible in the First Circuit. In the Seventh Circuit, all the taped conversations are admissible, even those that did not include a Government agent as a party to the conversation.

This Court should establish one national rule and resolve this conflict among the First, the Eleventh, and the Seventh Circuits.

3.

In addition, the circuit courts, with the exception of the Seventh Circuit, correctly hold that an interception occurs when and where a conversation is recorded or redirected, even if no one listens at that time or in that

location. See *United States v. Tavarez*, 40 F.3d 1136, 1137-39 (10th Cir. 1994); *United States v. Denman*, 100 F.3d 399, 402-403 (5th Cir. 1996). These holdings, too, are irreconcilable with Petitioner's case, and important jurisdictional consequences evolve for district courts as a result of this split.

Section 2518(3) limits a district court's jurisdiction to issue eavesdropping orders to the district in which that judge is sitting. 18 U.S.C. § 2518(3). Investigations, however, often span more than one jurisdiction. Which jurisdiction is the right district to issue the eavesdropping order depends on when and where an "interception" occurs. Section 2510(4) defines "intercept" as the "aural or other acquisition" of a communication. 18 U.S.C. § 2510(4). "Listening" is not a prerequisite for an "intercept" as defined in Section 2510(4).

In *United States v. Nelson*, 837 F.2d 1519, 1527 (11th Cir. 1988), for example, the court held that, "the term intercept . . . refers to the place where a conversation is initially obtained regardless of where the communication is ultimately heard." The Second Circuit also holds that "when the contents of a wire communication are captured or redirected in any way, an interception occurs at that time." *United States v. Rodriguez*, 968 F.2d 130, 136 (2nd Cir. 1992). Thus, the other circuits agree a conversation is intercepted when, and where, it is first captured by the recording equipment, even if listening occurs somewhere else or the agents do not listen to the tape immediately. *Denman*, 100 F.3d at 402-406. This split also must be resolved to fix the jurisdictional point for the many multi-jurisdiction investigations that are ongoing or will occur in the near future.

B. REVIEW IS NECESSARY TO PRESERVE TITLE III'S POLICY REQUIRING JUDICIAL REVIEW BEFORE AGENTS INSTALL AN EAVESDROPPING DEVICE IN A PRIVATE HOME.

According to the Seventh Circuit, federal agents can decide when, where, and under what circumstances they may install and monitor a recording device in a private residence. They do not need advance approval of the Attorney General, as required by Section 2516, nor do they need authorization from a judge, as required by Section 2518. 18 U.S.C. §§ 2516 and 2518. They are not even required to tell the judge that the eavesdropping device is already installed, if they later decide to seek a Title III order. *United States v. Warneke*, 310 F.3d at 542, 544-545 (7th Cir. 2003).

"[Few] threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63, 18 L.Ed.2d 1040 (1967). For that reason, Title III prohibits the installation of any device that is primarily designed to intercept conversations, until a district court has approved its installation and use. *Giordano*, 416 U.S. at 515. Nonetheless, according to the Seventh Circuit, judicial approval is not required in advance of the installation of a fully-activated recording apparatus in a private home.

The Seventh Circuit's holding represents a quantum shift away from careful judicial oversight of eavesdropping orders, as mandated by Title III. Instead of requiring advance judicial approval, federal agents will be trusted to install eavesdropping devices at their whim, as long as they later claim they did not listen to any conversations.[9] This re-allocation of the initial decision-making authority

[9] But see the Foreign Intelligence Surveillance Act, 50 U.S.C. 1801(f)(4), which is incorporated by reference into Title III, and holds that eavesdropping begins when installation occurs.

is irreconcilable with Title III's core policy. *Giordano*, 416 U.S. at 515-18.

"[I]nvestigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop" because Congress decided that "[t]he mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order." *Giordano*, 416 U.S. at 515-16. In *Giordano*, the Court held that Title III was violated, even though the agents met the probable cause criteria of Title III and they secured a judicially approved eavesdropping order before they installed the listening device. Their failure to secure, in advance of installation, approval from the Attorney General, in addition to a court order, violated an essential provision of Title III so the conversations that later were recorded were suppressed. *Id.*

In Petitioner's case, the listening device was installed without the approval of the Attorney General and without judicial authorization. Thus, the agents, misconduct here was more egregious than the Title III violation that led to suppression of the evidence in *Giordano*.

The Seventh Circuit's decision has broad and dangerous policy implications. Congress expressly removed decision-making authority from the investigating agents. 18 U.S.C. § 2516. Unchecked investigative authority yields "too readily to pressures to obtain incriminating evidence and [to] overlook potential invasions of privacy. . . . " *United States v. United States District Court*, 407 U.S. 315, 319, 32 L.Ed.2d 752 (1972). Title III tightly controlled the problem of overzealous agents by expressly prohibiting agents from installing eavesdropping equipment until they had the approval of the Attorney General and a judicially issued eavesdropping order. *Giordano*, 416 U.S. at 515-16.

Common sense teaches us not to trust blindly the word of an agent who, by prematurely installing the eavesdropping device, has already violated the rules and regulations of the law enforcement agency that employs her. Department of the Treasury, Alcohol Tobacco and Firearms,

Manual on Electronic Surveillance, 1989, at Chapter C, p. 21. Petitioner's case is a perfect example of the utter futility of placing unchecked discretion in investigating agents.[10] The agents knew they violated Title III when they installed the live recording device in Petitioner's home, but none of them came forward and advised the judge that they had already bugged Petitioner's home. They chose not to tell the issuing judge that the surreptitious entry was a *fait accompli* and the bug was already installed. *Warneke*, 310 F.3d at 545. Their code of silence trumped their duty to Title III, the Fourth Amendment, and any judicial authority.[11]

The Seventh Circuit's ruling eliminates legislatively mandated protections and nullifies Congressional policies. The Seventh Circuit's new, judicially created expansion of the powers of investigating agents is irreconcilable with Title III.

Review by this Court is necessary to ensure that advance judicial authorization of *all* eavesdropping orders is not reduced to an afterthought.

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[10] Police misconduct is far from unusual in search and seizure related cases. Orfield, *Deterrence, Perjury & The Heater Factor: An Exclusionary Rule in Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75, 90 (1992); Orfield, *The Exclusionary Rule: An Empirical Study of Chicago Narcotics Officers*, 54 U. Chi. L. Rev. 1016, 18 (1987) (concluding that police misconduct, including perjury, is endemic in search and seizure cases).

[11] The existence of a "very deeply rooted code of silence" among police officers cannot be doubted. See Mollen Commission Report (1994) (describing in detail the pervasive and longstanding effects of the "blue wall of silence."

II. THE SEVENTH CIRCUIT CAUSED A SPLIT AMONG THE CIRCUITS ON A RECURRING CONSTITUTIONAL ISSUE INVOLVING THE ASSIGNMENT OF THE BURDEN OF PROOF TO ESTABLISH AN INDEPENDENT, UNTAINTED SOURCE ONCE A FOURTH AMENDMENT VIOLATION IS ESTABLISHED.

INTRODUCTION

Review is necessary to resolve a sharp and important split between the circuits. This split implicates the integrity of criminal proceedings and threatens to undermine civil liberties at a crucial point in the history of the country. The First, Fourth, Fifth, and Ninth Circuits are in conflict with the Seventh Circuit on a recurring Fourth Amendment issue.

What is at stake is the proper allocation of the burden of proof when Government agents engage in unconstitutional conduct, but seek to avoid suppression of evidence by claiming an independent source. See *Murray v. United States*, 487 U.S. 533, 536-538 (1988). Each of the other circuits appropriately places the burden of proof on the Government to prove the agents did not benefit from their illegal conduct. See *United States v. Madrid*, 152 F.3d 1034, 1037-38 (8th Cir. 1998) The Seventh Circuit now wrongfully places the burden on the victim of the unlawful conduct. *Warneke*, 310 F.3d at 544, 545. Review by this Court is necessary to end the split opened by the Seventh Circuit's decision and to remove any new incentive to violate the Fourth Amendment.[12]

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[12] As Professor LaFave explained, "If illegally-obtained information is merely stricken and the balance of the affidavit assessed as if the tainted information had never been included, then the police are tempted to make illegal searches to bolster what would otherwise be borderline affidavits." LaFave, *Search and Seizure*, Section 11.4(f).

A. THE SEVENTH CIRCUIT CAUSED A SPLIT AMONG THE CIRCUITS BY ALTERING THE TEST FOR DETERMING WHETHER AGENTS WHO VIOLATED THE CONSTITUTION BENEFITED FROM THEIR MISCONDUCT.

The facts are not in dispute. Agents illegally monitored signals from a bugged lamp in Petitioner's home at least eighteen days (March 2nd to March 20th) before the first Title III order was issued. "[M]onitoring . . . a beeper in a private residence . . . violates the Fourth Amendment." *United States v. Karo*, 468 U.S. 705, 714 (1984).[13] The government conceded, and the District Court properly held, that the agents violated Petitioner's constitutional rights by monitoring the bugged lamp. *United States v. O'Neill*, 27 F.Supp.2d 1121, 1131 (E.D. Wis. 1998).[14]

The court, however, held that the Fourth Amendment violation did not taint the Title III application. *Id.* Whether the agents were influenced to seek a Title III order for Petitioner's home, as a result of their knowledge that the listening device was already installed and operational there, was not addressed at first by the District Court. *Id.* Later, the District Court ordered an evidentiary hearing based on new evidence indicating that the agents listened to Petitioner's private conversations before the Title III order was entered. This evidentiary hearing, however, was limited to "allowing" Petitioner to prove the

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[13] See also *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (holding that monitoring the details of private residence, even from outside the home, violates the Fourth Amendment).

[14] "The Court also agrees with Magistrate Callahan's conclusion that the government violated O'Neill's right to privacy when it began monitoring the microwave transmissions for the listening device without first obtaining Title III order."

agents did not listen to his conversations before March 20th.

The hearing was held before a magistrate judge who, at the conclusion of the evidence, recommended denying Petitioner's motion. The District Court upheld the magistrate's recommended finding and denied the motion to suppress. *Id.* Like the magistrate, the District Court neglected to consider whether the agents were "prompted or influenced" to target Petitioner's home for the Title III order because they knew the bug was already installed, and operational, in his home.

Similarly, when the case was heard on appeal, the Seventh Circuit neglected to consider the effect the federal agents' unconstitutional monitoring had on their decision to target Petitioner's home for the Title III order. *Warneke*, 310 F.3d at 544, 545. Instead the Seventh Circuit held that the independent source inquiry focuses exclusively on probable cause. *Id.* That the agents were influenced to target Petitioner's home was irrelevant for the Seventh Circuit.

The Seventh Circuit's holding cannot be squared with *Murray*. There, the Court placed the burden on the government to prove: a) probable cause for a Title III order based solely on untainted evidence, and b) that the agents were not "prompted" to seek the Title III order as a result of their unconstitutional conduct. *Murray*, 487 U.S. at 542. The burden of proof is assigned to the government "to deter police from violations of constitutional and statutory protections," and to ensure that the police are in the same, not a better, position as a result of their misconduct. *Nix v. Williams*, 476 U.S., at 443-45 (1984) Thus, "*Murray* instructs that even if the illegality unquestionably contributed not at all to the magistrate's decision to issue the warrant, the warrant is nonetheless tainted if the illegally obtained facts 'prompted the agents' decision to seek the warrant." LaFave, *Search and Seizure*, at Section 11.4.

Until Petitioner's case, the circuit courts followed *Murray* and consistently placed the burden on the Government to prove the agents did not target a specific

location as a result of their prior, judicially unauthorized search. *United States v. Campbell*, 945 F.2d 713, 716 (4th Cir. 1991) illustrates the position taken by the other circuits. In *Campbell*, the agents had probable cause to obtain a search warrant but the record was "incomplete as to whether the agents' decision to secure the warrant was prompted by what was observed" during the prior illegal search. *Campbell*, 945 F.2d at 716. The Fourth Circuit remanded the case for a hearing on that issue, a course of action that is clearly required by *Murray*.

United States v. Restrepo, 966 F.2d 964, 971 (5th Cir. 1992) is another example of the split opened by the Seventh Circuit. The police in *Restrepo* had probable cause to secure a warrant without using information that was obtained during a prior illegal search. The Fifth Circuit, nevertheless, remanded the case to the district court to decide whether the prior illegal conduct "prompted or motivated the officers' decision to seek the warrant" for a particular location. *Restrepo*, 966 F.2d at 972. The court noted that the second prong of *Murray*, the one completely ignored in Petitioner's case, was intended to prevent "the so-called 'confirmatory search' conducted for the precise reason of making sure it is worth the effort to obtain a search warrant." *Id.*, quoting LaFave, *Search and Seizure*, Section 11.4(f) at 70.

The same course of action was followed by the Ninth Circuit in *United States v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995). There, as in *Campbell* and *Restrepo*, the court held that because "the district court did not" explicitly find that the agents would have sought a warrant for the same location, the case was remanded for a ruling on that issue, even though there was probable cause for a warrant to issue. *Hill*, 55 F.3d at 481. Thus, the holding in Petitioner's case created a split with the holdings from the Fourth, Fifth, and Ninth Circuits in *Campbell*, *Hill*, and *Restrepo*. See also *United States v. Runyan*, 275 F.3d 449, 466-68 (5th Cir 2001) (holding that the government has the burden of meeting both prongs of *Murray* and that

there must be an explicit finding by the district court as to each prong).

According to the Seventh Circuit, but only the Seventh Circuit, the second prong of *Murray* is superfluous. Government agents can use the information they gain during a "confirmatory search" to target a home as the site for an eavesdropping order. Confirmatory searches, however, are very difficult to uncover and create a compelling incentive to search first and seek a warrant later. That is why the other circuits require the government, not the victim of the agents' misconduct, to prove the agents were not influenced to seek the Title III order by the information they gained during the unconstitutional monitoring. See *Search and Seizure*, at Section 11.4.[15] The Seventh Circuit has caused a split on an issue that recurs on a daily basis, and review by this Court is necessary.

B. THE SEVENTH CIRCUIT'S RULING ALSO VITIATES ESTABLISHED CONSTITUTIONAL PRINCIPLES THAT DETER POLICE MISCONDUCT.

By shifting the burden of proof from the Government to the victim of the unlawful conduct, the Seventh Circuit also undermines a long-standing Fourth Amendment policy. The Court "has never sustained a search upon the sole ground that officers reasonably expected to find evidence. . . . " *United States v. Katz*, 389 U.S. 347, 356-57 (1967). The Fourth Amendment checks unfettered police investigations by interposing advance judicial review and a warrant. *Payton v. New York*, 445 U.S. 573, 590 (1980).

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[15] The second prong of *Murray* serves to deter confirmatory searches, those searches where "the police, . . . wanted a greater assurance that evidence was in the premises before expending all the time and effort inevitably involved in obtaining and executing" a Title III order. *Search and Seizure*, at Section 11.4, p. 110.

At the core of the policy is the well-documented conclusion that investigating officers cannot be trusted to report their own misconduct. *Stanford v. Texas*, 379 U.S. 476, 482 (1965). Fourth Amendment violations cannot be deterred if the judicial system must rely on the police to report their own misconduct. For that reason, the burden is on the agents, not the person whose constitutional rights were violated, to prove the agents did not benefit from their unconstitutional behavior. *Nix*, 467 U.S. at 445.

Here, however, the agents clearly benefited, directly and indirectly, from the illegal searches. First, the agents used the information they secured from the illegally installed bug to target Petitioner's residence for the Title III eavesdropping order. The agents admitted they were considering Title III intercept applications for "either O'Neill's residence or the Outlaws' Clubhouse. . . . " (Gov't Br., at 36). His residence was ultimately chosen, rather than the clubhouse, because the agents knew that the bug already was installed and operational in his home. On that basis alone, Petitioner is entitled to a reversal. *Murray*, 487 U.S. at 535-39. *Id.*

In addition, by all accounts, Petitioner was wary of Government surveillance and he kept his home private. He routinely checked for eavesdropping devices, and he was suspicious of any new or unanticipated activity around his home. Patricia Wolf was the Government's only reliable informant and the only one with any access to Petitioner's home. By the time the agents applied for the Title III order, her role as an informant was unmasked and well-known to Petitioner, so she was no longer a welcome guest in Petitioner's home. *Id.* The agents, however, did not have to worry about how, when, or by whom the bug would be installed because they knew it

was already in Petitioner's home.[16] Jumping the constitutional gun paid off for the Government. Had they not unlawfully installed the bug and unconstitutionally monitored it, they would not have been able to bug Petitioner's home.

Neither the District Court nor the Seventh Circuit even considered this issue. Those courts resolved Petitioner's case by applying a one-step process that is irreconcilable with the two-part evaluation required by *Murray* and faithfully followed by the other circuits. Review, therefore, is essential to resolve the conflict among the circuits and to preserve the deterrence principles of the Fourth Amendment's exclusionary rule.

CONCLUSION

This Court should issue the writ of certiorari and review Petitioner's case.

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[16] But see *United States v. Gallo*, 863 F.2d 185, 191 (2nd Cir. 1988): "it was impractical, if not physically impossible for Special Agents . . . to effect surreptitious entry."

In The

Supreme Court of the United States

KEVIN P. O'NEILL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

APPENDIX

APPENDIX

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310 F.3d 542

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Carl J. WARNEKE, David Kadlec, Leslie J. Jensen, Robert A. Kruppstadt, Randall E. Miller, Richard E. Mroch, Kevin P. O'Neill, Harvey E. Powers, and James W. Schneider, Defendants-Appellants.

Nos. 00-3179, 00-3720, 00-3721, 00-3731, 00-3740, 00-3865, 00-4344, 00-4345 and 01-1683.

Argued Oct. 17, 2002.
Decided Nov. 12, 2002.
As Amended on Denial of Rehearing and Rehearing En Banc Jan. 10, 2003.

Eric J. Klumb (argued), Steven M. Biskupic, Scott James Campbell (argued), Carol L. Kraft, Office of U.S. Atty., Milwaukee, WI, for U.S.

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George F. Taseff, Richard H. Parsons (argued), Office of Federal Public Defender, Peoria, IL, for Harvey E. Powers.

William H. Theis (argued), Office of Federal Defender Program, Chicago, IL, for James W. Schneider.

Before EASTERBROOK, MANION, and KANNE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Warfare broke out between the Outlaws and Hell's Angels motorcycle gangs during the 1990s when the Angels began to establish a presence in the Midwest by absorbing the Hell's Henchmen, another motorcycle "club." The conflict seems to have been more about control of criminal activities (such as drug sales) than about divergent methods of motorcycle maintenance or incompatible bikes (both groups favor Harleys). The record in this criminal prosecution establishes that members of the Outlaws used murderous force to ward off the threat, and the Angels replied in kind. Outlaws preferred sneak attacks (using bombs) to open ones but were not averse to other weapons. The Outlaws acquired and used at least one AK-47 assault rifle, along with many other guns. An elderly couple with no connections to either group is among the dead, and three police officers were injured when a bomb exploded as it was being dismantled.

A grand jury charged that the Outlaws were a criminal "enterprise" that the nine defendants operated through a pattern of racketeering (including shootings, bombings, robbery, drug sales, and passing counterfeit money), violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68. James Schneider pleaded guilty and was sentenced to 45 years in prison. The other eight went to trial and were convicted. Five of the eight were sentenced to life imprisonment; the rest received long terms of years. The evidence against each of these eight is overwhelming, and we do not discuss individual challenges to its sufficiency. Nor does the defendants' complaint about trying seven of them together (a last-minute problem with counsel led the judge to give Harvey Powers a separate trial) require analysis beyond a citation to *Zafiro v. United States,* 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993), and the observation that the judge did not abuse his discretion.

Considerable evidence came from transmitters inside lamps in the homes of Outlaws Kevin O'Neill and David Wolf. A warrant authorized agents to hear and record the communications. Nonetheless, defendants contend, the evidence should have been suppressed because not only installation of the bugs but also a determination that one was functional preceded issuance of the warrant – and the judge was not told that these things had occurred.

The installation of the bugs did not violate the fourth amendment: the Constitution does not protect criminals against the risk that their associates will assist the police. See *Hoffa v. United States,* 385 U.S. 293, 300-03, 310-12, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Placement of these microphones was the result of good police work plus luck. The informant was Patricia Wolf, David's wife, who set up

two lamps, one containing a microphone. Visiting the Wolf home, O'Neill said that he liked the lamps. Patricia then swapped the inactive lamp for a second bugged lamp. When O'Neill repeated his admiration of the lamps and asked if he could have one, Patricia graciously assented. O'Neill took one of the lamps (it did not matter which) and thus bugged his own home. But he didn't plug it in, and without electricity it was useless. So Patricia Wolf paid O'Neill's girlfriend a friendly visit and helped her improve the lighting in O'Neill's office. Agents drove by O'Neill's residence to find out if this worked; they learned from detecting a carrier signal that it had. Whether this step created a constitutional problem under the holding of *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), is not a question we need decide, because no evidence based on the monitored signal was used against O'Neill at trial. What *was* used was the ensuing conversations, and their interception was authorized by a warrant issued in response to an affidavit that did not mention the monitored signal (or for that matter the fact that the bug-infested lamp was in place already). Because the agents did not intercept (*i.e.,* did not either record or listen to) any communications until after the warrant had issued, installation of the device at O'Neill's home (and determination that it was working) did not violate statutory limits on eavesdropping; until interception begins, a bug is nothing but a "tracking device" under 18 U.S.C. § 3117(b). See also 18 U.S.C. § 2510(12).

We may suppose (without deciding) that when seeking authorization to listen to conversations the agents should have told the judge that the lamps were already in place, but this does not matter. It is not conceivable that the judge would have said anything like: "Because you used an

informant to install one microphone and tricked O'Neill into bugging his own home, I will deny you permission to listen even though you have established probable cause to believe that the bugs will reveal evidence of crime." Cf. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Perhaps the judge would not have authorized clandestine entry had he realized that bugs already were in place. Prosecutors say that they sought authority to enter in case the lamps should be unplugged or not transmit signals strong enough to be recorded; the judge might have required prosecutors to show one of these problems before authorizing an entry. But in the event no entry was made. So there is no causal chain from the omission to any evidence used against the defendants, and no basis for suppression.

Defendants press several objections to their RICO convictions. One that affects all defendants is a contention that conspiracies may not be included among the predicate racketeering offenses. Defendants contend first that no inchoate offense can be "racketeering activity" as 18 U.S.C. § 1961(1)(A) defines that term, and second that use of conspiracy as a predicate is particularly inappropriate when the federal crime is a RICO conspiracy violating § 1962(d). (They also contend that there was one big underlying conspiracy, for at most one predicate offense, rather than multiple conspiracies with different criminal objects. This presented a jury question, resolved adversely to defendants at trial on the basis of ample evidence. We do not discuss this theme further.) Objections to the use of conspiracies as predicate crimes have been made in other circuits, uniformly without success. See *United States v. Ruggiero,* 726 F.2d 913, 918-20 (2d Cir.1984); *United States v. Manzella,* 782 F.2d 533, 537-38 (5th Cir.1986);

United States v. Licavoli, 725 F.2d 1040, 1044-45 (6th Cir.1984). We agree with these decisions.

Section 1961(1)(A) defines "racketeering activity" to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year". The indictment listed 34 predicate acts of racketeering activity, some of which were (or included) conspiracies to do one or more of these things – for though the Outlaws carried out many malevolent acts, sometimes their plans went awry and only inchoate crimes could be proven. It is no stretch to describe a plot to blow up a Hell's Henchmen clubhouse (with members inside) as an "act or threat involving murder . . . which is chargeable under State law and punishable by imprisonment for more than one year". Conspiracy means agreement, and agreement is an "act" rather than just a thought. Conspiracies are illegal because of what they portend (that is, what the conspirators threaten to do). What is more, all of the state-law conspiracies listed as predicate offenses depend on proof of overt acts – concrete steps toward the substantive crime, steps that themselves qualify as predicate offenses. The prosecutor did not charge as predicate offenses any conspiracy that may be established without proof of an overt act – such as a drug conspiracy under federal law, see *United States v. Shabani,* 513 U.S. 10, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994).

There's no reason to distinguish the substantive RICO offense under § 1962(a), (b), or (c) from a RICO conspiracy under § 1962(d) when it comes to use of inchoate offenses

as predicates. The definition in § 1961(1)(A) does not vary with the choice of subsection in § 1962. See *United States v. Neapolitan,* 791 F.2d 489, 501 (7th Cir.1986). True enough, we held in *United States v. Baker,* 905 F.2d 1100 (7th Cir.1990), that a drug conspiracy may not be used as a predicate offense for purposes of the Continuing Criminal Enterprise statute, 21 U.S.C. § 848. But this was because any drug conspiracy would be a lesser included offense of the crime defined by § 848. By contrast, a conspiracy to commit murder is not a lesser included offense of the RICO crime, which is defined as operating or managing an enterprise through a pattern of racketeering activity. It is possible to manage an enterprise without killing anyone (or conspiring to do this), so using a conspiracy as a predicate offense does not entail double counting.

Powers offers a wrinkle on these arguments. He starts from the fact that § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity". In order to "conduct or participate" in the enterprise, one must have "some part in directing" its affairs. See *Reves v. Ernst & Young,* 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993); *United States v. Swan,* 250 F.3d 495, 498-99 (7th Cir.2001). Yet the conspiracy charge under § 1962(d) did not require the jury to find that Powers had directed, managed, or otherwise conducted the enterprise. Relying on *Neibel v. Trans World Assurance Co.,* 108 F.3d 1123, 1128-29 (9th Cir.1997), Powers insists that only a person who participates in an enterprise's management or operation may be guilty of conspiracy under § 1962(d). And although Powers was

convicted of a substantive RICO offense, he contends that the jury instructions for this crime were incorrect so that the jury did not necessarily find that he managed or conducted any of the Outlaws' operations.

Neibel is an unsatisfactory decision. It assumes that only a person who has committed the substantive crime can be guilty of conspiracy and then holds that this principle applies to RICO too. Yet there is no such principle. As cases such as *Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), and *United States v. Pino-Perez,* 870 F.2d 1230 (7th Cir.1989) (en banc), show, one may be a conspirator or aider and abetter even if one cannot be convicted as a principal. Example: a person can conspire to distribute drugs without actually distributing drugs, indeed without ever having acquired drugs to distribute. One may commit the crime of conspiracy even though it is impossible to perform all of the acts constituting the substantive offense. See, e.g., *United States v. Feola,* 420 U.S. 671, 694, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975); *Hyde v. United States,* 225 U.S. 347, 365, 32 S.Ct. 793, 56 L.Ed. 1114 (1912). "A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense". *Salinas v. United States,* 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). But this requirement will be met whenever the conspirator joins forces with someone *else* who manages or operates the enterprise. Section 1962(d) is not limited to a conspiracy among the top dogs. So we held in *Brouwer v. Raffensperger, Hughes & Co.,* 199 F.3d 961, 967 (7th Cir.2000), and reiterated in *Swan,* 250 F.3d at 499. Nothing in *Neibel* persuades us to change course. Indeed, the ninth circuit seems not to have recognized that it was going against the Supreme Court's view of what is

necessary to prove a criminal conspiracy. It claimed to be following *United States v. Antar,* 53 F.3d 568 (3d Cir.1995), and *United States v. Quintanilla,* 2 F.3d 1469 (7th Cir.1993), but *Quintanilla* has nothing to do with this subject, and the third circuit has disavowed the passage in *Antar* to which *Neibel* referred, and disagreed with *Neibel*'s holding too. See *Smith v. Berg,* 247 F.3d 532, 536-38 (3d Cir.2001). Every other circuit that has considered this subject likewise has disapproved *Neibel.* See *United States v. Zichettello,* 208 F.3d 72, 98-99 (2d Cir.2000); *United States v. Posada-Rios,* 158 F.3d 832, 857 (5th Cir.1998). See also *United States v. Starrett,* 55 F.3d 1525, 1547 (11th Cir.1995) (a pre-*Neibel* RICO prosecution of other Outlaws in which the court held that the RICO conspiracy offense does not require proof that the defendant operated or managed the enterprise). We shall stick with *Brouwer.*

As for the jury instructions in Powers's trial concerning the substantive RICO offense: The judge told the jury that

> [a] person "conducts or participates in the conduct of the affairs of an enterprise" if that person uses his position in, or association with, the enterprise to perform acts *which are involved in some way in* the operation or management of the enterprise, directly or indirectly, or if the person causes another to do so.

According to Powers, the language we have italicized waters down the statutory requirement that the person "conduct" or "participate in" the operation or management of the enterprise. Under the instruction given, for example, a secretary who types a letter for a manager might violate § 1962(c) even though the letter had nothing to do with any predicate offense, because sending letters is

"involved in some way" in the operation or management of the business. *Reves* and *Swan* hold that to violate RICO the person must have a real operational (or managerial) role, while the italicized language sweeps up peripheral figures.

This is a good point in principle. It would be better for a district judge to use language of the kind suggested in *Swan,* or just use the statutory language. Section 1962(c) declares that it is "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through" a pattern of specified predicate acts. The phrase "directly or indirectly" already contains enough flex that the addition of phrases such as "involved in some way" may move jurors too far from the law itself. The terms in the statute are not abstruse legalisms; attempts at elaboration may not improve the accuracy of decisions. But the language the district judge used does not vitiate the conviction, because other parts of the instructions made it clear that only those who personally carry out the "pattern of racketeering activity" may be convicted. Secretaries, lamp dealers, and other peripheral figures who might be swept in by the phrase "involved in some way" are swept right out again by the racketeering-activity element. There was no risk that a harmless functionary would be convicted under the full set of instructions given to Powers's jury, and the evidence was ample to show that Powers "conducted" the affairs of his chapter of the Outlaws through a pattern of bombings, shootings, and other violence, for which he was awarded a special commendation that he wore openly, proclaiming his role as an enforcer. (Powers wore a patch bearing a skull and crossed pistons, with an "SS" insignia awarded only to

members who had committed acts of violence on the group's behalf. After becoming a full member of the Outlaws in fall 1994, and receiving the SS insignia for his role in killing LaMonte Mathias, Powers committed several additional murderous acts and participated in other criminal activities to boot.)

Defendants individually and collectively make a passel of additional arguments. Powers, for example, wanted more time so that his new lawyer could work through the voluminous record. Yet counsel had six months for this purpose – and the invaluable benefit of watching the other seven defendants' trial. That preview of the evidence and strategy was worth many additional months of preparation time. Most of the defendants complain about the limiting instructions that the judge gave. They essentially wanted the judge to remind the jury incessantly that particular evidence might have value against one defendant but not others, or might have value contingent on a finding that the defendants were co-conspirators. See *United States v. Martinez de Ortiz,* 907 F.2d 629 (7th Cir.1990) (en banc). Perhaps this could have been handled better, but too many reminders get irksome and jurors will tune them out. At the close of the case defense counsel did not ask for an instruction recapping the tasks of separation that the jurors needed to perform – but the arguments of counsel drove home the nature of the task. Each defendant's lawyer reminded the jurors (without contradiction from judge or prosecutor) that guilt must be assessed individually, using only evidence about what that defendant did or said. We could go on, saying a few words about each remaining line of argument, but the trials were well handled by the district judge and it

suffices to say that we have considered these arguments and find no abuse of discretion.

The only other contentions that require individual treatment are those based on *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Seven defendants were tried before *Apprendi;* Powers was tried afterward, and in his case the jury was asked to (and did) determine beyond a reasonable doubt whether the circumstances that raised the maximum punishment to life imprisonment had been established. That approach satisfied the due process clause, even though the indictment did not include all of the details that potentially affected the sentence. See *United States v. Cotton,* 535 U.S. 625, 122 S.Ct. 1781, 1785-87, 152 L.Ed.2d 860 (2002); *United States v. Smith,* 308 F.3d 726, 739-42 (7th Cir.2002). Providentially, the district judge asked the jury to return special verdicts, one for each predicate act, even in the pre-*Apprendi* trial. For six defendants these special verdicts show that the jury found, beyond a reasonable doubt, events that justify a punishment as high as life imprisonment. With respect to these six there is no *Apprendi* problem. With respect to Carl Warneke, however, a problem remains.

The maximum penalty following a RICO conviction depends on the maximum penalty for the most serious predicate offense. For Warneke, that offense was murder committed in Illinois. Illinois authorizes life imprisonment (or capital punishment) for killing with certain aggravated circumstances, such as "exceptionally brutal or heinous behavior indicative of wanton cruelty" or premeditated murder. See 730 ILCS § 5/5-8-1(a)(1)(b). Lesser degrees of murder may have lower maximum sentences. The problem lies in Predicate Act 20, which alleged that an Outlaw

murdered Jack Castle in a drive-by shooting. Act 20 included two subparts: generic conspiracy to commit murder (Act 20A) and premeditated murder (Act 20B). The latter carries a life sentence; the former does not. The jury instructions did not call on the jurors to determine whether Act 20A or Act 20B (or both) had been committed; the special verdict referred to Act 20 as a unit. The prosecutor contended that Warneke, though not the shooter, had directed the murder and thus was accountable as a principal under Illinois law, but the jury did not find this explicitly.

But neither did the district court commit plain error in sentencing Warneke to life imprisonment. Because he did not make an *Apprendi*-like argument in the district court, and did not ask for a special verdict distinguishing Act 20A from Act 20B, only plain error could justify reversal now. See Fed.R.Crim.P. 52(b); *United States v. Bjorkman,* 270 F.3d 482 (7th Cir.2001); *United States v. Nance,* 236 F.3d 820 (7th Cir.2000). Plain error means error that not only is apparent in retrospect (as this error is) but also threatens an injustice – which this error did not. For although the jury did not *find* that Warneke was the brains behind this premeditated murder (one carried out by lying in wait), the record demonstrates this. Several witnesses testified in detail about this murder and Warneke's role in its planning. Warneke did not dispute the evidence that Castle's execution was carefully planned. Instead Warneke denied that he took part in that planning. *That* argument the jury considered, and rejected beyond a reasonable doubt, when it found that Warneke was responsible for Predicate Act 20. The important finding was made by the jury, on the right standard. So no

injustice has been done; the error turns out to have been wholly formal.

Schneider has a distinct theory: because he bypassed the jury when pleading guilty, *no one* found *anything* beyond a reasonable doubt. We inquired at oral argument whether Schneider wants to withdraw his plea and go to trial, on the rationale that he would not have pleaded guilty had he known that he was giving up the right to have the jury determine beyond a reasonable doubt those circumstances that fix his maximum punishment. Counsel answered no. By pleading guilty and assisting the prosecutor, Schneider reduced his punishment. The likely result of withdrawing the plea and going to trial would be a life sentence. What Schneider wants instead is to retain the benefit of the plea while avoiding any exposure to a penalty exceeding 20 years (the "minimum maximum" for every RICO conviction). This is not an available outcome. What actually happened certainly is not plain error (the standard for Schneider, as for Warneke, because no timely argument was made in the district court). The predicate acts to which Schneider *confessed* as part of his plea expose him to life imprisonment. Schneider certainly wasn't "denied his right to a jury trial," as his reply brief says; he *waived* his right to a jury trial. His own admissions resolved all important matters against him. An admission is even better than a jury's finding beyond a reasonable doubt; it removes all contest from the case. See *United States v. Broce,* 488 U.S. 563, 570, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).

AFFIRMED.

27 F.Supp.2d 1121

United States District Court,
E.D. Wisconsin.

UNITED STATES of America, Planitiff,
v.
Kevin P. O'NEILL, et al., Defendants.

No. 97-CR-98.

Oct. 19, 1998.

William O. Marquis, Milwaukee, WI, for Kevin P. O'Neill.

Ann T. Bowe, Milwaukee, WI, for Carl J. Warneke.

Edward J. Hunt, Milwaukee, WI, for Raymond L. Morgan, Jr.

Daniel Resheter, Jr., Milwaukee, WI, for Robert A. Kruppstadt.

Michael R. Barth, Brookfield, WI, for Richard E. Mroch.

James C. Reiher, Milwaukee, WI, for Johnson F. Blake.

Thomas G. Halloran, Milwaukee, WI, for William B. Brock.

Robert J. Penegor, Brookfield, WI, for James E. Hanson.

Pamela Pepper, Milwaukee, WI, for Allen J. McVay.

Robert LeBell, Milwaukee, WI, for James E. Meinen, Jr.

Franklyn Gimbel, Milwaukee, WI, for Randall E. Miller.

Christopher T. Van Wagner, Madison, WI, for Harvey E. Powers.

Dean A. Strang, Milwaukee, WI, for James C. Rostron.

Charles W. Giesen, Madison, WI, for Leslie John Jensen.

ORDER

STADTMUELLER, Chief Judge.

On June 3, 1998, Magistrate Judge William E. Callahan, Jr. issued a recommendation and order addressing the second round of pretrial motions ("Round II") in the above-entitled case. The second round of pretrial motions includes motions to suppress and motions to dismiss based upon evidentiary arguments. Pursuant to 28 U.S.C. § 636(b)(1)(A), the defendants filed objections to the magistrate's recommendation and order. On July 30, 1998, the government filed its response to many of the defendants' objections. The court will address the issues in the same order as presented by the magistrate where possible.

I. Motions Regarding the Title III Intercepts

Magistrate Callahan denied defendant Kevin P. O'Neill's "Motion for Discovery Related to Motion to Suppress Title III Evidence" (joined by defendant Meinen), Recommendation and Order at 57, and recommended the denial of O'Neill's "Omnibus Motion to Suppress Evidence Intercepted or Gathered under Title III" (joined by defendants Kruppstadt, McVay, Meinen, Powers, and Blake).

Recommendation and Order at 25, 27, 41, 50, 55. O'Neill now objects to the magistrate's Recommendation and Order at, inter alia, pages 25, 27, and 41.

A. Probable Cause and Title III Intercepts, Recommendation and Order at 25-26

Magistrate Callahan recommended the rejection of O'Neill's motion to suppress to the extent that such motion was grounded on the argument of the lack of probable cause and/or lack of necessity. Recommendation and Order at 25. The entirety of O'Neill's objection to the recommendation regarding alleged lack of probable cause is as follows:

> Before a Title III order is given, an application must demonstrate probable cause (sec.2518(1)(b) and (3)[sic]). This must include probable cause to [sic] the individuals, or targets, to [sic] the particular communications, and to [sic] the particular facilities. Based upon his motion and prior brief and memorandum, Defendant O'Neill objects to and disputes the Magistrate's findings, and ultimate ruling as proclaimed at page 25.

Defendant O'Neill's Memorandum in Support of Objections to the Magistrate's Recommendation and Order (Second Submission on Objections to the Order) (hereinafter "O'Neill's Second Objections") at 3-4.

Generalized objections, absent specific legal authority, do not invoke the district court's obligation to perform a *de novo* review of a magistrate's decision: "*De novo* review of a magistrate judge's recommendation is required only for those portions of the recommendation for which particularized objections, accompanied by legal authority and

argument in support of the objections, are made." *Banta Corp. v. Hunter Publ'g Ltd.,* 915 F.Supp. 80, 81 (E.D.Wis.1995). "[W]ithout specific reference to portions of the magistrate's decision and legal discussion on the objected portion, the district court's duty to make a *de novo* determination does not arise. The general statements that a party 'objects' and 'incorporates all arguments previously made to the magistrate' will not suffice." *United States v. Molinaro,* 683 F.Supp. 205, 211 (E.D.Wis.1988); *see also Thomas v. Arn,* 474 U.S. 140, 149, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (holding that "[s]ection 636(b)(1)(C) . . . does not on its face require any review at all . . . of any issue that is not the subject of an objection").

Therefore, defendant O'Neill's generalized objection to the recommendation regarding alleged lack of probable cause does not invoke this court's duty to review the magistrate's recommendation pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 13.03(c). For this reason, the court will not perform a *de novo* review and will therefore adopt the magistrate's recommendation to deny O'Neill's motion to suppress to the extent that such motion was grounded on the argument of lack of probable cause.[1]

O'Neill also objects to the magistrate's recommendation that this court reject O'Neill's motion to suppress to the extent that such motion was grounded on the argument of lack of necessity. Recommendation and Order at

[1] In light of the magistrate's exhaustive listing of factors supporting probable cause, it is difficult to imagine any predicate for O'Neill's objection. *See* Recommendation and Order at 11-17.

25. O'Neill's objection to this recommendation is also quite succinct:

> Defendant O'Neill has made extensive arguments on this issue in prior submissions, and will not duplicate them here, but asks that this Court review these carefully in addressing this issue. One major theme presented there is that the necessity portions of the applications are nearly identical in each application and continuing applications. These are not only redundant, but they are all based on affidavits signed by a witness whose credibility has been called into question around [sic] these issues. Yet the Magistrate, in reviewing this issue, simply takes statements from this agent's affidavits as explanation as well as findings that necessity exists. Such reliance is misplaced and insufficient. This Court must have a hearing on the true "necessity" of these Title III intrusions.
>
> O'Neill's Second Objections at 4-5.

As stated above, general statements of objection and blanket references to arguments previously made to the magistrate will not suffice. *See Molinaro,* 683 F.Supp. at 211. Regarding O'Neill's argument that the identity of necessity sections of the surveillance applications somehow calls their validity into question, O'Neill has not presented any legal support for this argument. If anything, the consistency and thoroughness of these sections indicates that the government exhausted all other possible avenues of investigation, which, as Magistrate Callahan noted, is the important issue here. Regarding O'Neill's cursory argument that the credibility of the witness who signed the affidavits supporting the surveillance applications "has been called into question," the court refuses to

reject the magistrate's well-reasoned and comprehensive recommendation regarding necessity on the basis of such a flimsy and unsupported accusation. Therefore, the court will adopt the magistrate's recommendation to deny O'Neill's motion to suppress to the extent that this motion was grounded on the argument of lack of necessity.

B. Use of Evidence to Prove Crimes Not Listed In Intercept Orders, Recommendation and Order at 27-40

O'Neill also objects to the magistrate's recommendation to deny O'Neill's motion to suppress to the extent the motion argues that all electronic surveillance applications and orders are invalid because they refer to 18 U.S.C. § 842(h), a crime not specified in Title III, 18 U.S.C. § 2516(1) (section 2516(1) lists offenses for which orders authorizing electronic surveillance may be granted). O'Neill's objection to this recommendation is the shortest of all of his objections – in response to the magistrate's statement that inclusion of section 842(h) does not mean that all interceptions are to be suppressed, O'Neill simply states that "defendant disputes this, and wonders aloud what remedy should be employed for such a violation. The order is silent." O'Neill's Second Objections at 9-10.

O'Neill's verbal ruminations are no substitute for legal analysis and citation to authority. O'Neill offers no support for his argument that inclusion of a reference to a non-listed offense in the surveillance authorizations completely invalidates those authorizations. Indeed, relevant authority indicates that quite the opposite is true. *See United States v. Marcy,* 777 F.Supp. 1400, 1403 (N.D.Ill.1991) (holding that "the government may use lawfully obtained wiretap evidence to prove crimes not specified in the

wiretap order, and may do so even if those crimes are not specifically targeted by Title III"). As Magistrate Callahan notes, all of the other numerous offenses listed in the surveillance applications and authorizations are listed in section 2516(1). Recommendation and Order at 25. Therefore, the court will adopt the magistrate's recommendation to deny O'Neill's motion to suppress to the extent the motion argues that all electronic surveillance applications and orders are invalid because they refer to 18 U.S.C. § 842(h).

O'Neill further objects to the recommendation to deny O'Neill's motion to suppress to the extent the motion argues that the evidence gathered through the surveillance relates to crimes not specified in the authorizing orders and for which the government had not sought subsequent authorization. The magistrate first held that although the government charged defendants with crimes not specified in the original surveillance authorizations, these crimes involve the same facts and elements as those listed in the original surveillance authorizations, so defendants "cannot be harmed" by the government's failure to seek subsequent authorizations. Recommendation and Order at 27. The magistrate then held that even if the government should have sought subsequent authorization, it "is not precluded from yet obtaining such an order authorizing the use of such evidence at trial." *Id.* O'Neill attacks only the second part of this recommendation, arguing that it is too late now for the government to seek subsequent authorization. O'Neill's Second Objections at 9.

Government agents must seek subsequent authorization for wiretaps relating to crimes not specified in the original authorizing order before seeking an indictment

regardless of the similarity between crimes that are specified in the original order and those that are not. *United States v. Brodson,* 528 F.2d 214 (7th Cir.1975). In *Brodson,* the government charged the defendant with violations of 18 U.S.C. § 1084; however, the original wiretap order "only authorized interceptions covering violations of 18 U.S.C. § 1955." 528 F.2d at 215. The government did not apply for subsequent authorization under 18 U.S.C. § 2517(5) until just prior to trial – some eight months after the grand jury returned its indictment. *Id.* The Seventh Circuit upheld the district court's dismissal of the indictment, holding that the government should have sought subsequent authorization before submitting the evidence to the grand jury:

> Here, the Government's claim, that the authorizations applicable to the Section 1955 violations were also relevant to Section 1084 violations, should have been tested by submitting them to a judge in accordance with the rationale of Section 2517(5). This the Government failed to do within the time requirement of 'as soon as practicable' that the Section specifies. Moreover, without submitting to the requirements of Section 2517(5), the Government disclosed the intercepted conversations to the Grand Jury.

Id. at 215. The court explicitly rejected the government's argument that it did not need subsequent authorization because of the similarity of the offenses, stating that "[t]he controlling factor here, however, is not the dissimilarity of the offenses, but the fact that the Government itself has violated the key provision of Section

2515, in that it did not comply with the mandate of Section 2517(5)." *Id.* at 216.[2]

Courts in the Seventh Circuit interpreting *Brodson* have rejected the idea that authorization for eavesdropping regarding RICO predicate acts implicitly includes authorization for eavesdropping regarding RICO offenses, *see United States v. Mancari*, 663 F.Supp. 1343 (N.D.Ill.1987), the exact holding proposed by the magistrate in this case. *See* Recommendation and Order at 27.[3] The *Mancari* court rejected this approach, deeming it inconsistent with *Brodson*:

> In recent years, courts have attempted to evade the harsh results compelled by Brodson through more "flexible interpretations . . . [The] third approach, which arises in the context of RICO

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[2] The Seventh Circuit also has required that (1) the original authorization order was lawfully obtained, (2) it was sought in good faith and not as a subterfuge search, and (3) the questionable communication was incidentally intercepted during the course of a lawfully executed order. *United States v. Arnold*, 773 F.2d 823, 829 (7th Cir.1985). However, O'Neill has not raised these points in his objection; therefore, the court will not consider them.

[3] The magistrate also cited *United States v. Marcy*, 777 F.Supp. 1400, 1403 (N.D.Ill.1991), in support of this proposition. However, the magistrate quoted from a section of *Marcy* discussing whether the government could use wiretap evidence regarding crimes not listed in 18 U.S.C. 2516(1), not whether the government could use evidence regarding crimes not listed in the original wiretap authorization order. *Id.* Furthermore, *Marcy* is distinguishable because the government has not sought a superseding indictment after obtaining subsequent authorization in this case, as the government did in *Marcy* : "We . . . find that, particularly where the government has brought a superseding indictment after obtaining a § 2517(5) disclosure order, dismissal of the indictment or suppression of certain wiretap evidence is not appropriate." *Id.*

> cases, reasons that where an order explicitly authorizes interceptions aimed at RICO predicate acts, it implicitly approves eavesdropping for RICO offenses as well because the latter is merely the aggregation of the former. . . . That these three approaches violate the letter and spirit of the Seventh Circuit's holding in Brodson is unquestionable. That case found irrelevant the degree to which the necessary evidence or constituent elements of the originally listed crimes and the subsequently discovered offenses overlapped."
>
> 663 F.Supp. at 1351-52.

All is not lost for the government, however, as the Seventh Circuit has distinguished *Brodson* where (1) the indictment merely adds grounds to the original wiretap authorization, as in this case, rather than indicting a defendant on wholly different grounds, as in *Brodson;* and (2) the government voids the first indictment, seeks subsequent authorization, and then brings the case before a second and uninfected grand jury, which may then indict a defendant again, rather than, as in *Brodson,* waiting until eight months after presenting the information to a grand jury to seek subsequent authorization. *See United States v. Shields,* 999 F.2d 1090, 1097 (7th Cir.1993), *cert. denied, Shields v. United States,* 510 U.S. 1071, 114 S.Ct. 877, 127 L.Ed.2d 74 (1994).[4]

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[4] The *Shields* court hinted that it may be moving away from *Brodson*'s rejection of the "integral parts" theory propounded by the magistrate in this case, holding that:

> [T]he [added] charges were based on the same set of facts as the [offense listed in the original wiretap authorization].

(Continued on following page)

Therefore, pursuant to Seventh Circuit precedent, the government must seek subsequent authorization to add the additional offenses charged in the first indictment to the wiretap order, dismiss the first indictment against the defendants, and pursue a superseding indictment before a second and uninfected grand jury.

Because, pursuant to *Brodson,* the entire indictment must be dismissed, those defendants detained on these charges would normally be entitled to release from custody. However, the court may stay their release pending the procurement of a superseding indictment or an appeal of the dismissal of the pending indictment. *See United States v. Alfonso,* 143 F.3d 772 (2d Cir.1998). Therefore, the court will provisionally order that all defendants detained on the offenses charged in the indictment be released from custody; however, the release order will be stayed for a period of 30 days to allow the government an opportunity to consider an appeal or seek a superseding

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> Since the government was free to release this information to a grand jury anyway under the [initial] authorization, it is difficult to see how the defendants were harmed when the same facts were presented in the context of different offenses.

999 F.2d at 1097. However, this statement was only part of a holding that emphasized the importance of obtaining a subsequent authorization and superseding indictment rather than allowing the government to prosecute a defendant on the basis of a faulty indictment. *Id.* Therefore, although the court believes that the *Brodson* rule is unduly harsh and that "the rationale behind section 2517(5) is outdated," *see* John D. LaDue, *Electronic Surveillance and Conversations in Plain View: Admitting Intercepted Communications Relating to Crimes Not Specified in the Surveillance Order,* 65 NOTRE DAME L. REV. 490, 519 (1990), the court finds that Seventh Circuit precedent requires the government to obtain an untainted superseding indictment.

indictment after compliance with 18 U.S.C. § 2517(5). If the government chooses to appeal or to seek a superseding indictment, it must move for an extension of the stay or move the court to vacate the release order once an untainted grand jury has returned a superseding indictment.[5]

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[5] If the government chooses to appeal this dismissal under 18 U.S.C. § 3731, this court will continue to consider and rule on the balance of the magistrate's Round II and Round III recommendations and orders during the pendency of the appeal. Although appeals typically divest this court of jurisdiction, the court may continue to rule on issues unrelated to those appealed:

> The next question is whether the government's appeal divested the district judge of jurisdiction to rule on the rest of the motion to suppress. The general rule, and it is applicable to appeals under section 3731, is that an appeal transfers jurisdiction from the district court to the court of appeals, so that the two courts will not be stepping on each other's toes. There are exceptions, however, for situations in which the danger of such a collision is remote. . . . Since the right to appeal conferred by section 3731 is pinpointed on particular evidentiary rulings, there will be many cases in which the taking of the appeal will not require the district court to relinquish jurisdiction; that court will be able to continue getting the case ready for trial.

United States v. Ienco, 126 F.3d 1016, 1018 (7th Cir.1997) (citations omitted). The court realizes that proceeding in a case that has been dismissed in its entirety is different from proceeding in a case where part of a suppression motion has been granted. However, the government's appeal of this issue, if allowed to bring this unusually large and complex case to a screeching halt, would have a "disruptive effect on the criminal trial process," and thus the court is "obliged to balance the government's right to appeal pretrial orders with the defendants' right to proceed." *United States v. Andrews,* 764 F.Supp. 1252, 1258 (N.D.Ill.1991) (citing *United States v. Gatto,* 763 F.2d 1040, 1050 (9th Cir.1985)).

C. Minimization, Recommendation and Order at 41-49

O'Neill objects to the magistrate's recommendation to deny O'Neill's motion to suppress to the extent the motion argues that the government failed to minimize the interceptions of wire and oral communications as required by Title III. O'Neill admits that the magistrate addressed this issue "at considerable length" but argues that his motion should have been granted because the government submitted conflicting evidence regarding the number of calls considered "pertinent illegal" or "other illegal."

As the magistrate correctly held, the defendants bore the burden to rebut the government's prima facie showing of minimization, which they did not even attempt to do. Recommendation and Order at 41. It is defendants' burden to establish a pattern of interception of innocent conversations, *see United States v. Dorfman,* 542 F.Supp. 345, 390 (N.D.Ill.1982), *aff'd,* 737 F.2d 594 (7th Cir.1984), and O'Neill's assertion that the government submitted allegedly inconsistent wiretap statistics falls far short of satisfying that burden. Therefore, the court will adopt the magistrate's recommendation to deny O'Neill's motion to suppress to the extent that such motion was grounded on the argument of lack of minimization.

D. The "Bugged" Lamp, Recommendation and Order at 41-57

O'Neill objects to the magistrate's recommendation that this court deny his motion to suppress the information that the government obtained by placing a listening device in the O'Neill residence. Recommendation and Order at 50. O'Neill argues that the government violated

the provisions of Title III when it introduced the lamp containing the listening device into the O'Neill residence before obtaining a Title III order authorizing such placement. O'Neill's Second Objections at 2-10; Defendant O'Neill's Objections to Magistrate's Recommendation and Order (hereinafter "O'Neill's Objections") at 1-6.

The court agrees with the magistrate that the Supreme Court's decision in *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), offers appropriate guidance in deciding the legitimacy of the government's actions. In *Karo,* the defendant contacted an undercover government informant and ordered 50 gallons of ether which he intended to use to extract cocaine from clothing imported into the United States. 468 U.S. at 708, 104 S.Ct. 3296. With the informant's consent, government agents placed an electronic homing device (a "beeper") into one of the ten cans of ether. *Id.* at 708-709, 104 S.Ct. 3296. Using the signal from the homing device, the government traced the movements of the ether cans to several storage lockers and then to a house rented by the defendants. *Id.* at 709-10, 104 S.Ct. 3296. Using some of the information obtained from the beeper, the government then applied for and received a warrant to search the rented house. *Id.* The search revealed the ten cans of ether, laboratory equipment, and cocaine. *Id.*

The Supreme Court first examined the government's actions in placing the beeper device in one of the cans of ether. The Court held that because the beeper was placed in the ether can with the consent of the government's informant, that placement did not infringe on the defendant's privacy interest. *Id.* at 712, 104 S.Ct. 3296. The Supreme Court reasoned that:

> The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest. It conveyed no information that Karo wished to keep private, for it conveyed no information at all. To be sure, it created a potential for an invasion of privacy, but we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.

Karo, 468 U.S. at 712, 104 S.Ct. 3296. The Supreme Court also determined that the presence of the beeper within the can of ether did not constitute a seizure within the meaning of the Fourth Amendment: "Although the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way. At most, there was a technical trespass on the space occupied by the beeper." *Id.* Therefore, the Court concluded that the government's clandestine placement of the beeper into the ether can did not infringe upon the defendant's Fourth Amendment rights. *Id.* at 713, 104 S.Ct. 3296.

On the other hand, the Supreme Court also has determined that certain uses of electronic signals emanating from a beeper may violate a suspect's Fourth Amendment rights. In *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), the Court ruled that the government legitimately monitored an electronic beeper without invading the defendant's Fourth Amendment rights because the object containing the beeper remained within public eyesight. *Knotts,* 460 U.S. at 283-84, 103 S.Ct. 1081. However, the Court limited this ruling by determining that the monitoring remained legitimate only as long as the beeper stayed in an area subject to normal police observation, because the government in effect would

be using the beeper to augment information which already was available to their normal senses. *Id.* at 283, 103 S.Ct. 1081. The *Knotts* Court reasoned that:

> Visual surveillance from public places along [the codefendant]'s route . . . would have sufficed to reveal all of these facts to the police. The fact that officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting their the sensory faculties bestowed upon them at birth with such enhancement as science and technology have afforded them in this case.

Knotts, 460 U.S. at 282, 103 S.Ct. 1081. Therefore, because the defendant in *Knotts* placed the bugged container outside of his residence, in a location visible to people viewing the house from the outside, the police did not violate the defendant's Fourth Amendment rights when they monitored the electronic signal coming from the container. *Id.* at 285, 103 S.Ct. 1081.

In the instant case, the government did not violate O'Neill's Fourth Amendment rights by placing the inactive listening device in the lamp. The government placed the device in the lamp with the consent of Patricia Wolf. Government's Response at 5. As with the containers discussed in *Knotts,* the government did not use the listening device to confirm that the lamp entered the O'Neill residence. Therefore, the court agrees with the magistrate's conclusion that the government did not violate the Fourth Amendment in placing the listening device in the lamp. Recommendation and Order at 48-49.

The court also agrees with Magistrate Callahan's conclusion that the government violated O'Neill's right to privacy when it began monitoring the microwave transmissions from the listening device without first obtaining a Title III order. *Id.* However, the court does not find any indication that the government actually recorded any conversations which took place before it obtained the Title III order from Judge Terence T. Evans.[6] Therefore, the government's pre-warrant monitoring of the listening device only supplied the government with one piece of information: the fact that the lamp had been plugged in. The court agrees with Magistrate Callahan's finding that the government's knowledge that the lamp had been plugged in did not play even the smallest role in Judge Evans's decision to grant the Title III order. Recommendation and Order at 47.

Furthermore, when Judge Evans issued the Title III order, he authorized the government to engage in any surreptitious entries that it needed to make in order to install the listening device. This is not to say that the ends justified the means: the government should not have monitored the microwave transmissions before obtaining the Title III order. However, even when the court strips

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[6] Although Attorney William Marquis, counsel for Kevin O'Neill, argues that he can prove that the government intercepted conversations which took place before the government obtained a Title III order, he has given the court no indication of how he might do so. Instead, counsel resorts to making derogatory and sarcastic comments regarding the magistrate's recommendation and order. In the future, counsel would be well advised to use law and facts in order to advance his client's cause. In any event, the court agrees with the magistrate that an evidentiary hearing on this issue will not be necessary. Recommendation and Order at 46.

the government of the limited benefits that it obtained from the premature monitoring, the government still had sufficient evidence with which to obtain the Title III order. Therefore, O'Neill has failed to meet his heavy burden under *Franks v. Delaware,* 438 U.S. 154, 171, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and the court will adopt Magistrate Callahan's recommendation to deny the motion to suppress the evidence obtained through the listening device installed in the lamp. Recommendation and Order at 50.

II. Johnson F. Blake's Objections, Recommendation and Order at 58-69

Johnson Blake objects to the magistrate's recommendation to deny his motion to suppress evidence obtained during a search of his car and residence. Recommendation and Order at 58-69; Defendant Johnson F. Blake's Objections to Magistrate's Recommendation on Motion to Suppress under *Franks v. Delaware* (hereinafter "Blake's Objections") at 1. Blake also objects to the magistrate's denial of his request for a hearing pursuant to *Franks,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667. Under *Franks,* the defendant must show that the government engaged in "deliberate falsehood or reckless disregard for the truth" in obtaining the contested search warrant. *Id.* at 171, 98 S.Ct. 2674. Furthermore, this court must give the judge who issued the warrant, Magistrate Judge Stephen L. Crocker, great deference in reviewing his determination of probable cause. *Illinois v. Gates,* 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (citing *Spinelli v. United States,* 393 U.S. 410, 419, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)). Blake maintains that in obtaining the search warrant, the government purposely omitted facts which, if

revealed, would have undermined the issuing judge's probable cause determinations. Blake divides the alleged omissions into three categories which Magistrate Callahan evaluated individually in his recommendation to this court.

A. Special Agent DeValkenaere's Alleged Criminal Acts, Recommendation and Order at 61-62

First, Blake contends that ATF Special Agent Jeffrey Boobar failed to disclose that ATF Special Agent Sandra DeValkenaere's reliability was "tainted" because of her participation in illegal acts. Blake's Objections at 2. Blake contends that Agent DeValkenaere acted illegally when she participated in the placement of a listening device into a lamp which she knew might eventually end up in Kevin O'Neill's house. *Id.* at 2.

As this court has already determined, Agent DeValkenaere did not act illegally in placing the listening device in the lamp. Furthermore, Blake does not offer any substantial authority to contradict the magistrate's determinations with regard to the bugged lamp. Agent DeValkenaere did not intentionally violate federal law, and the court agrees with Magistrate Callahan that Agent Boobar did not have a duty to tell the magistrate that Agent DeValkenaere engaged in criminal acts. Such a statement would not have been true.

Blake also argues that the magistrate's recommendation adopts an "ends justifies the means" approach in evaluating Blake's motions to suppress. Blake's Objections at 4. The court agrees that judges should not employ an "ends justifies the means" analysis in deciding such motions. However, the court cannot find any indication

that Magistrate Callahan engaged in this type of analysis, nor does Blake offer any explanation as to where or how this type of analysis occurred. *Id.* Absent a defendant's specific showing of error, the court may adopt, and in this case will adopt, the magistrate's position in full. *See United States v. Molinaro,* 683 F.Supp. at 211; 28 U.S.C. § 636(b)(1).

B. The Reliability of David Wolf, Recommendation and Order at 63-67

Second, Blake argues that Agent Boobar failed to tell Magistrate Crocker, the magistrate who issued the Blake search warrant, that David Wolf, a cooperating witness, did not have firsthand knowledge about the information which Agent Boobar presented in his affidavit in support of the search warrant. In considering an application for a search warrant, a magistrate may rely on hearsay. Fed.R.Crim.P. 41(c)(1). Furthermore, a court may base its finding of probable cause on hearsay from confidential informants. *United States v. Taylor,* 931 F.Supp. 1447, 1459 (N.D.Ind.1996) (citing *United States v. Daccarett,* 6 F.3d 37, 56 (2nd Cir.1993)) *aff'd,* 154 F.3d 675 (7th Cir.1998). Thus, "[e]ven if the bulk of the warrant affidavit was based on hearsay evidence conveyed by a confidential informant, such evidence alone will not flaw the affidavit." 931 F.Supp. at 1459 (citing *United States v. Carmichael,* 489 F.2d 983, 986 (7th Cir.1973)).

In deciding Blake's motion to suppress, this court needs to evaluate whether Agent Boobar's affidavit contained sufficient indicia of reliability to justify Magistrate Crocker's reliance on that document. Magistrate Callahan found that Magistrate Crocker relied on Wolf's testimony because Wolf also incriminated himself in his statements.

Wolf's admission against his penal interest falls under a recognized and long-standing indicia of reliability. *See* Fed.R.Evid. 804(b)(3).

Although Blake argues the merits of the evidence showing that Blake either was or was not present for the J & R Watering Hole incident, the court agrees with Magistrate Callahan's finding that "[i]n any event, whether or not Blake was present at J & R's watering hole is of little consequence. The warrant sought from Magistrate Crocker was not for Blake's arrest for the J & R Watering hole incident or, for that matter, any other incident." Recommendation and Order at 66. The defendant has not met his burden for invalidating the warrant, and the court will not alter the magistrate's recommendation and order as to this issue.

C. The Reliability of Mark Quinn, Recommendation and Order at 67-68

Third, Blake questions the reliability of the information provided by confidential informant Mark Quinn. As with the first two objections, Blake largely reiterates the arguments that he submitted to the magistrate. Blake contends that Agent Boobar's affidavit failed to disclose that Agent DeValkenaere found Mark Quinn to be untruthful and evasive. Blake also argues that Agent Boobar should have told Magistrate Crocker that Agent DeValkenaere did not prepare a report for February 14, 1996, a date on which Agent DeValkenaere claims Mark Quinn gave her important information. With regard to the February 14, 1996 report, Magistrate Callahan found that "[e]ven if [Magistrate] Crocker had been advised that there was no such report of an interview, such a fact would not in and of itself have fatally undermined a finding of

probable cause." Recommendation and Order at 68. The court agrees with the magistrate that there are many possible explanations for why the report was not filed on the appointed day, and that absent any showing of intentional omission or foul play, the court cannot dispute Magistrate Crocker's probable cause determination in issuing the warrant.

With regard to Agent DeValkenaere's prediction that Mark Quinn might not prove a reliable informant, the magistrate found that the issuing court relied upon Agent Boobar's assurance that Quinn had provided reliable information on approximately 35 prior occasions before he told Agent Boobar about the scheduled February 15, 1996 meeting. The court finds that Magistrate Crocker had a sound basis for accepting Quinn's statements and making the determination of probable cause.

Although Blake contests several portions of the evidence contained in the Boobar affidavit, the court finds that none of the contentions rise to the level of showing that the government presented the affidavit "in deliberate falsehood or reckless disregard for the truth." *Franks,* 438 U.S. at 171, 98 S.Ct. 2674. The court agrees with Magistrate Callahan that many of Blake's contentions do not affect the validity of the search warrant. Magistrate Crocker had more than enough information before him in order to establish the probable cause required for issuance of the search warrant. Thus, the court will adopt Magistrate Callahan's recommendations in full on this issue.

III. Defendant Miller's Motion to Dismiss, Recommendation and Order at 75-80

Defendant Randall E. Miller objects to the magistrate's recommendation that his motions to dismiss and suppress be denied. The magistrate recommended denial of these motions because Miller failed "to identify any particular statements he may have made or any particular items of physical or documentary evidence which he claims were seized as a result of a particular unlawful search or surveillance." Recommendation and Order at 79. The magistrate concluded that Miller "provide[d] insufficient information for this court to entertain his arguments and afford him any relief." *Id.* at 80.

Miller's objection does not cure this problem. Miller merely states that he objects to the recommendation "to preserve this issue" and that he "reserves the right to continue to argue these issues." Objections of Defendant Randall E. Miller to Magistrate's Recommendation and Order of June 3, 1998 at 3. Miller explains that he is unable to more clearly identify the evidence he wants suppressed because of time constraints, massive discovery, and government evasiveness. *Id.* at 2. While this may be unfortunate, it certainly does not give this court a reason not to adopt the magistrate's recommendation on this point. Therefore, the court will deny defendant Miller's motion to dismiss, motion to suppress, and motion to suppress statements.

IV. Morgan's Motion to Suppress, Recommendation and Order at 81-94 and 147

Defendant Raymond Morgan objects to the magistrate's recommendation that this court deny part of his

"Motion to Suppress Evidence Seized as a Result of the March 8, 1995, Arrest, Search and Seizure in [sic] Evidence in Gary, Indiana." The magistrate recommended partial denial of this motion because probable cause supported the issuance of the warrant; however, the magistrate also recommended granting the motion to the extent the search violated the Fourth Amendment prohibition against general searches.

Morgan first argues that the fact that a suspect in the murder of Jack Castle, Alan Smick, was seen fleeing into the Outlaws clubhouse in Gary, Indiana, and the fact that the vehicle seen at the murder scene was parked behind the clubhouse (both of which occurred on the day before the search warrant was executed) did not provide probable cause to support a search of those premises. Morgan argues that since the clubhouse was not Smick's residence or maildrop, law enforcement officials could not have reasonably assumed that Smick or (what was presumably) his car could be found there the day after he was seen fleeing into the clubhouse. In support of this argument, Morgan cites two cases, *United States v. Brown,* 832 F.2d 991 (7th Cir.1987), and *United States v. Huguez-Ibarra,* 954 F.2d 546 (9th Cir.1992).

Neither case helps Morgan. In *Brown,* the court did not analyze the agreed-upon fact that the search warrant in that case was not supported by probable cause but merely stated as an *example* that the affidavits used to apply for the search warrant did not specify how police knew the premises to be searched were inhabited by the defendant. 832 F.2d at 994. *Brown* did not establish a categorical rule that all search warrants of premises other than a suspect's are invalid, even when the suspect is seen fleeing into the premises. In *Huguez-Ibarra,* the court

found that there was no probable cause to search premises where the evidence offered in support of the warrant application consisted merely of (1) observation of automobiles at the premises that allegedly belonged to "affiliates" or "facilitators" of drug trafficking; and (2) a canine sniff of suitcases belonging to people leaving the house that did not turn out to contain any drugs. 954 F.2d at 551. In contrast, the law enforcement officials in this case observed the murder suspect and his car present at the premises to be searched, a much stronger showing of probable cause.

Furthermore, the court believes that seeing the murder suspect flee into his gang's clubhouse and seeing the car that was present at the murder scene parked behind the clubhouse provided probable cause to support the warrant. Morgan would have this court hold that seeing a fleeing suspect run into a house actually destroys probable cause because a court must presume that a suspect would then flee out of and away from the house. Such a holding would turn probable cause on its head and would encourage suspects to flee in the hope that a court would not issue a search warrant because of a presumption that a suspect will continue to flee, an untenable result. Therefore, the court will adopt the magistrate's recommendation on this point.

Morgan next argues that although the magistrate correctly found that the search warrant was general and was therefore prohibited, the magistrate's application of the severance doctrine was not the correct legal remedy. Although the U.S. Supreme Court and the Seventh Circuit have not ruled on this issue, the magistrate noted that a majority of federal circuits have adopted the severance doctrine. *See* Recommendation and Order at 88-89. Morgan

does not cite any authority to support his argument that severance is not a proper remedy. Therefore, the court will adopt the magistrate's recommendation on this point.

Finally, Morgan objects that the seizure of documents containing names and addresses of Outlaw members and clubhouses was improper because there is an "insufficient nexus" between the Castle murder and this evidence. This court disagrees and holds that there was a sufficient nexus between the two. For example, two men who witnessed part of the Castle murder told the investigating officer that Castle was a member of Hell's Angels and feared that he was going to be murdered by members of the Outlaws, the rival motorcycle gang that had been involved in a gang war with Hell's Angels since June 1994. Recommendation and Order at 82-83. Under these circumstances, membership in the Outlaws was relevant to the Castle murder, and thus the search warrant authorizing the seizure of indicia of gang membership was valid.

V. Kruppstadt's Motion to Suppress, Recommendation and Order at 96-97, 186, 193

Defendant Richard Kruppstadt first objects to the magistrate's recommendation to partially deny Kruppstadt's motion to suppress evidence seized as a result of the search of his residence at 1228 Hayes Avenue, Racine, Wisconsin. The magistrate granted Kruppstadt's motion regarding photographs of motorcycles and of Kruppstadt unclothed, but denied the motion as to all other items seized. Recommendation and Order at 96-97.

Kruppstadt first objects that the firearms seized were not within the scope of the warrant and were not properly seized under the plain view exception, thereby requiring

suppression of those items. Kruppstadt argues that the firearms were not in plain view but were in a locked safe (and one firearm was also stored in a locked, opaque canvas bag). However, the officers were lawfully searching for any items relating to the Outlaws Motorcycle Club, and as long as those items could possibly fit in the safe or the opaque bag, a fact which this court has no difficulty finding, then the officers could lawfully enter those containers. *See, e.g., United States v. Reed,* 726 F.2d 339, 342 (7th Cir.1984). Therefore, the court rejects this objection.

Kruppstadt further argues for the suppression of several items that he alleges are not illegal to possess and do not bear any relationship to the Outlaws: a can of Mace, various photographs, a microwave detector, two mortgage payment books, one checkbook, a beret, "additional photos," business cards, and a car rental receipt. Defendant Kruppstadt's Objections to Magistrate's Recommendation and Order Dated June 3, 1998 Regarding Motion to Suppress and Indicia Search Warrants (hereinafter "Kruppstadt's Objections") at 5.

Regarding the Mace, the government notes that although citizens may possess pepper spray, they may not possess Mace (Kruppstadt apparently does not dispute this, as he did not respond to this statement by the government). Furthermore, Kruppstadt was convicted in April 1995 for possession of a similar unlawful substance. Because the incriminating nature of such evidence was therefore immediately apparent to the government agents searching Kruppstadt's residence, the court will not suppress this item.

Regarding the photographs, the magistrate properly recommended the suppression of photographs of motorcycles

and of naked people, and the government has indicated that it has no plans to introduce these photographs. However, those photographs that show Outlaws members with Outlaws tattoos and Outlaw paraphernalia are relevant and were properly seized under the terms of the search warrant. Therefore, the court rejects Kruppstadt's objection to the admission of those photographs.

Regarding the microwave detector, the government intends to prove at trial that Kruppstadt and O'Neill used the device to find microphones placed within O'Neill's residence; therefore, this evidence may well be incriminating, and the court thus rejects Kruppstadt's objection on this point. Regarding the mortgage payment books, the checkbook, the business cards, and the car rental receipt, the government states that it intends to use this evidence to prove that Kruppstadt was a resident of the premises searched, to prove Kruppstadt's use of the alias "Clay" and "Clay Allison," and to prove involvement in surveillance and violence directed at Hell's Angels members in La-Crosse, Wisconsin. Therefore, Kruppstadt's assertion that this evidence is "not related to the prosecution of this case" is incorrect, and the court rejects his objection. Finally, regarding the beret, the government intends to prove its association with the Outlaws, a contention to which Kruppstadt has not responded. Therefore, the court rejects this objection as well.

VI. Mroch's Motion to Suppress, Recommendation and Order at 101, 104-107

A. Search of Mroch's Residence, Recommendation and Order at 101

Defendant Richard Mroch objects to the magistrate's recommendation that this court deny his motion to suppress evidence seized as a result of a search of his residence located at 7332 West 59th Street, Summit, Illinois. The magistrate found that the search warrant was supported by probable cause because the police seized drugs in the possession of a woman, Melanie Crandall, who had just left Mroch's residence. The magistrate therefore recommended that the drugs, drug paraphernalia, United States currency, and proof of residency not be suppressed. *See* Recommendation and Order at 101.

Mroch first objects that an indictment and arrest warrant for Mroch do not supply probable cause to justify the search of his residence. Motion and Brief Challenging Magistrate Judge's Recommendation and Order Dated June 3, 1998 Regarding a Search Pursuant to a Warrant at Pages 97-107 (hereinafter "Mroch's Objections") at 5-6. However, probable cause to justify the search came from the seizure of drugs or drug paraphernalia that probably had just been in the Mroch residence, not from the indictment or arrest warrant for Mroch. Therefore, this objection is without merit.

Mroch then speculates that since Mroch's residence was a duplex, Crandall may have been entering a different part of the residence than Mroch's residence. Mroch's Objections at 6. He further speculates that since Crandall did not have the business cards that she allegedly picked up at Mroch's residence with her when she was pulled

over, the police did not determine that "any relationship existed between Ms. Crandall and Mr. Mroch." *Id.* at 6-7. However, the magistrate specifically found that Crandall "arrived at Mroch's residence," "retrieved the business cards left by Brezette and entered the residence," and then "left the residence carrying a brown plastic bag." Recommendation and Order at 98-99. Mroch fails to cite any evidence or testimony to contradict this account; therefore, the court cannot agree with his objection.

Mroch then argues that the traffic stop of Crandall was a pretext, arguing that it "seems highly unlikely" that a Police Detective Lieutenant would ever stop a motor vehicle for a traffic violation. Mroch's Objections at 7. As the government correctly notes, this argument is utterly without merit: "The argument that ulterior motives invalidate a police stop for a traffic violation is a tired argument in this circuit, . . . and this country." *United States v. Williams,* 106 F.3d 1362, 1365 (7th Cir.1997) (quoting *United States v. Murray,* 89 F.3d 459, 461 (7th Cir.1996) (citing *United States v. Trigg,* 878 F.2d 1037 (7th Cir.1989), and *Whren v. United States,* 517 U.S. 806, 808-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996))). Therefore, the court will reject this objection.

Mroch then argues that the search warrant was invalid because the officer's affidavit in support did not indicate whether Crandall carried an item such as a purse into the residence and did not indicate whether the white residue on the drug paraphernalia was tested for the presence of cocaine. Given the substantial other evidence cited in the affidavit, such as the 50 grams of cocaine

found with Crandall, the court does not believe that the absence of these facts renders the warrant invalid.[7]

Finally, Mroch argues that an affiant's sworn statements that the affiant believes that contraband will be found on a premises is not sufficient, citing *Nathanson v. United States,* 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933), and that an officer's statement that a credible person has stated that drugs are stored in a home is likewise inadequate, citing *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Mroch's Objections at 8-9. However, in neither of those cases did police actually seize contraband on its way out of the premises before applying for a warrant, as in this case. Therefore, these cases are distinguishable, and the court will adopt the magistrate's recommendation that this search warrant was supported by probable cause (other than the noted exception of the gang paraphernalia, *see* Recommendation and Order at 101).

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[7] In this same vein, Mroch argues that the investigating officer did not indicate in his affidavit how he knew that the food chopper was typically used for mixing controlled substances, and that "[i]n fact, Lt. Wasko testified that he had been a Lieutenant for only five years." Mroch's Objections at 7-8. Needless to say, one need not serve as a police officer, much less a lieutenant, for a lifetime to know that a chopper in a bowl containing a white residue, contained in a brown bag in someone's car, usually does not indicate innocent usage, e.g., that the possessor simply likes to chop up his or her sugar before he or she eats it.

B. "Plain View Exception," Recommendation and Order at 104-107

Mroch objects to the magistrate's recommendation that the remaining seized items not be suppressed because they fall within the plain view exception. *See* Recommendation and Order at 104-107. Mroch argues that the federal agent used the police officer's affidavit "as a mere subterfuge to search Mr. Mroch's residence for evidence for the alleged Rico Conspiracy investigation in the Eastern District of Wisconsin." Mroch's Objections at 10.

However, as the government correctly notes, pretext is no more of a defense against the plain view doctrine than it is against a traffic stop:

> The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search [but yet does not include the item in the warrant] should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.

Horton v. California, 496 U.S. 128, 138, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Therefore, the court rejects Mroch's "pretext" argument and will adopt the magistrate's recommendation that Mroch's motion to suppress be denied.

VII. Meinen's Motion to Suppress Physical Evidence and Statements, Recommendation and Order at 107-119

James Meinen objects to Magistrate Callahan's recommendation that this court deny his motion to suppress statements and his motion to suppress physical evidence. Meinen's Objections to Magistrate Judge's Recommendation

(hereinafter "Meinen's Objections") at 1-2. Meinen contends that the government violated his constitutional rights when federal agents searched his car for drugs and when they elicited statements from him during an interview after the search. *Id.*

As noted previously, the general statements that a party "objects" and "incorporates all arguments previously made to the magistrate" will not suffice. *Molinaro,* 683 F.Supp. at 211. This fundamental rule also applies to Meinen's objections. In this instance, instead of stating that the defendant "incorporates all arguments previously made to the magistrate," the defendant instead engaged a word processor to copy and paste together all of the arguments which he initially presented to the magistrate judge. The court finds this technique unpersuasive and needlessly repetitive. In order to rule upon the defendant's objections, the court will first have to wade through a sea of legal prose in order to winnow out the defendant's specific legal and factual objections.

The defendant maintains that the government did not have probable cause to search his car. He states that "[o]n the day in question, no one claimed to have seen the defendant obtain anything from the pharmacy clerk, much less the precise nature and identity of any theoretical object received." Meinen's Objections at 4. However, the magistrate found that in making the Meinen arrest, government agents relied upon their observations of the defendant that day, their observations of other defendants engaging in similar activities on previous occasions, their observations of the defendant engaging in a similar activity on a prior occasion, the corroborated evidence of a government informant, and potentially incriminating evidence obtained from K-Mart's security personnel.

Recommendation and Order at 108-12, 116. The defendant did not object to any of the above facts as set forth by Magistrate Callahan.

The government agents had sufficient probable cause to arrest the defendant and to search his car. Probable cause exists if, under the totality of the circumstances, "including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *United States v. Navarro,* 90 F.3d 1245, 1252 (7th Cir.1996). However, "[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Gates,* 462 U.S. at 243-44 n. 13, 103 S.Ct. 2317. The federal agents gathered more than enough evidence to provide them with probable cause for their arrest.

Meinen contends that the agents waited for an impermissible period of time before they decided to arrest him. Meinen's Objections at 4. He contends that the agents only waited because they wanted to search his car. *Id.* However, the facts indicate that the agents only waited the short period of time between when the defendant obtained the package from the pharmacy and when he entered his car. Recommendation and Order at 109-114. This time period could not have been more than one or two minutes, so the defendant faces an uphill battle in convincing the court that the government impermissibly delayed his arrest for the period of time that it took the defendant to walk from the store to his car in the parking lot. The defendant did not persuade the magistrate and fails to persuade this court that the government acted unreasonably. Thus,

the court will not suppress evidence based upon the timing of Meinen's arrest.

Finally, Meinen argues that the government agents illegally obtained statements from him without first informing him of his *Miranda* rights. Meinen's Objections at 5-6. However, Magistrate Callahan determined that Meinen was not in custody at the time that he gave the government the disputed statements, because the government had already informed him that he was free to leave. Recommendation and Order at 119. The magistrate reasoned that, although the government agents initially placed Meinen in custody when they handcuffed him and confined him to the back of a squad car, he was not in custody when he made the disputed statements. Because *Miranda* only applies to custodial interrogations, the government agents did not need to inform Meinen of his *Miranda* rights after they told him that he was free to go. *United States v. Vega,* 72 F.3d 507, 516 (7th Cir.1995). Meinen has not advanced any argument showing that he misunderstood or disbelieved the government agents when they told him that he was free to go. The court will adopt Magistrate Callahan's recommendations in full on this issue.

VIII. Blake's and O'Neill's Motion to Suppress Fox Lake Evidence, Recommendation and Order at 120-135

Defendants Johnson Blake and Kevin O'Neill object to Magistrate Callahan's recommendation that the court deny their motion to suppress evidence obtained in a February 10, 1994 search of Blake's van and to suppress statements which Blake made to law enforcement authorities subsequent to his arrest. O'Neill's Objections; Defendants Johnson F. Blake's and Kevin P. O'Neill's Objections

to Magistrate's Recommendation to Suppress Stemming From Fox Lake, Illinois, Arrest (hereinafter "Blake's Objections"); Recommendation and Order at 120. Although defendant O'Neill filed objections to this portion of the recommendation, the court cannot find any reasonable nexus between O'Neill's Fourth or Fifth Amendment rights and the Fox Lake searches. O'Neill did not own the van which Officer Bostic searched. At best, O'Neill might object to the pat-down search of his body. However, the search did not reveal any contraband, and the search did not result in the Fox Lake authorities bringing any charges against him. Additionally, O'Neill did not give the police any statements during or after the detention and subsequent arrest. Therefore, the court is left to evaluate the objections as they relate to Johnson Blake.

In evaluating these objections, the court reviewed the entire transcript of Magistrate Callahan's March 19, 1998 suppression hearing. The court finds that Magistrate Callahan made appropriate determinations as to the facts surrounding the Fox Lake incident and therefore adopts the factual background as presented in pages 120-126 of the recommendation. Although Blake points out that Officer Bostic provided a more detailed account of the incident to the court than he did in his original police report, the court finds no reason to discredit his testimony. During the hearing, Officer Bostic stated that he prepared his report as a device to refresh his memory in giving testimony and in keeping the facts of the arrest separate from those of other arrests. April 3, 1998 Transcript at 99, 107. Therefore, the court finds that Officer Bostic's omissions may have occurred as an oversight or perhaps out of his carelessness in preparing the report. In evaluating

Blake's objections, the court will view Officer Bostic's testimony as substantially correct.

The court agrees with the magistrate that Blake's objections present the court with two questions to decide. First, the court must determine if Officer Bostic violated Blake's Fourth Amendment rights when he searched him for weapons, placed him in a locked squad car, and then searched the interior of Blake's van. Second, the court must determine if Officer Bostic advised Blake of his *Miranda* rights prior to Blake's admission that the gun found in the van was his. Recommendation and Order at 127.

As to the first question, Blake contends that Officer Bostic did not have sufficient reason to detain him in the back of the police squad car nor to conduct the search of his van. Blake bases his objections on the Supreme Court's decision in *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). *Royer* states that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. The reasonableness requirement of the Fourth Amendment requires no less when the police action is a seizure permitted on less than probable cause because of legitimate law enforcement interests." *Royer,* 460 U.S. at 500, 103 S.Ct. 1319 (citations omitted). Although Blake strives to analogize the facts of his case to *Royer*'s facts, the facts of the cases remain dissimilar. In *Royer,* police officers escorted an air traveler suspected of drug smuggling to an airport interrogation room in order to ask him for permission to search his luggage. *Id.* at 492-95, 103 S.Ct. 1319. The Supreme Court reasoned that the police officers could have used drug testing dogs as a less invasive means to test for the presence of drugs in the defendant's luggage. *Id.* at

505, 103 S.Ct. 1319. The Supreme Court also found that the police officers subjected the defendant to a more restrictive level of detention than called for by the evidence available to them at the time: "What had begun as a consensual inquiry in public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions." *Id.* at 503, 103 S.Ct. 1319.

However, two years later, the Supreme Court limited its *Royer* requirement by admonishing courts not to second guess the legitimate law enforcement techniques used by the police. In *United States v. Sharpe,* 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), the Supreme Court ruled that courts making a reasonableness of detention determination "should take care and consider whether the police are acting in a swiftly developing situation, and in such cases the court should not engage in unrealistic second guessing." *Id.* at 686, 105 S.Ct. 1568. The Court warned that

> [a] creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But the fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, in itself, render the search unreasonable.

Id. at 687, 105 S.Ct. 1568 (citing *Cady v. Dombrowski,* 413 U.S. 433, 447, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)).

Throughout the past decade, federal courts have developed a more flexible approach to evaluating the

reasonable use of police procedures in conducting *Terry* stops.[8] The Seventh Circuit recently described this "trend towards greater latitude," stating that:

> In the recent past, the permissible reasons for a stop and search and the permissible scope of the intrusion under the *Terry* doctrine have expanded beyond their original contours. The last decade has witnessed a multifaceted expansion of *Terry,* including the trend granting officers greater latitude in using force in order to neutralize potentially dangerous suspects during an investigatory detention. For better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention.

United States v. Tilmon, 19 F.3d 1221, 1224 (7th Cir.1994) (citations omitted).[9] In applying this more permissive view of the Fourth Amendment with regard to *Terry* investigatory stops to the facts of this case, the court agrees with Magistrate Callahan that *Tilmon* proves instructive.

Officer Bostic acted within the confines of the Fourth Amendment when he patted down and then confined the defendants in the back seat of his cruiser. The police department dispatched Officer Bostic to the scene to

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[8] *See Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[9] The court notes that Magistrate Callahan included this same passage in his recommendation and order on page 128.

respond to a reported fight in progress. When he arrived on the scene, he observed two men (O'Neill and Miller) standing in front of a third man (Murphy) who appeared to be cornered and to have capitulated.[10] After Officer Bostic patted down O'Neill and Miller, he discovered more than adequate evidence to justify his decision to place the defendants in the police cruiser. Although simply possessing wrenches, Mace, and folding knives might not necessarily violate Illinois law, the presence of those items legitimately indicates that the men carrying them may not have been simply "talking" as they claimed.[11] Likewise, Officer Bostic appropriately used a show of force to compel Blake's compliance with his demands. Officer Bostic could not see Blake's body, and he did not know if Blake had ready access to a loaded gun or some other deadly weapon.

Finally, Officer Bostic appropriately entered Blake's van in order to investigate the gun case laying behind the driver's seat in the van. Possessing a firearm while in a vehicle is a crime in Illinois. *See* 720 Ill. Comp. Stat. Ann. 5/24-1(a)(4). Given the preceding circumstances of Officer Bostic's investigation in combination with his discovery of Mace, baseball bats, and handcuffs on the floor of the van, Officer Bostic had more than enough evidence to justify his entry into the van to investigate. Recommendation and

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[10] Officer Bostic reported that when he arrived on the scene, Murphy had his back against the van and had his arms outstretched, with his palms facing up. Bostic further testified that O'Neill and Miller were standing in front of Murphy so as to prevent him from stepping away from the van. Recommendation and Order at 121; April 3, 1998 Transcript at 109-110.

[11] The court notes that under Illinois law, citizens may not carry some forms of Mace. 720 Ill. Comp. Stat. Ann. 5/24-1(a)(3) (West 1998).

Order at 124. Also, as the magistrate found, Officer Bostic's looking into the van did not constitute a search, because the van door was open so that any passerby could have looked into the van and observed its contents. Recommendation and Order at 132. Therefore, under this court's reading of *Tilmon* and *Royer,* Officer Bostic's actions do not present a close call. The court will adopt Magistrate Callahan's recommendation to deny the motion to suppress.

As to the Fox Lake Police Department's inability to produce a *Miranda* waiver form for Johnson Blake, the court will defer to Magistrate Callahan's determinations as to witness credibility. The question of Blake's admission that he owned the Smith and Wesson model 3904 nine millimeter handgun comes down to one of credibility. Officer Bostic testified that he presented the *Miranda* warnings to Blake and that Blake signed the form. Blake contends that he never received his *Miranda* warnings and that his admission is thus inadmissable. Blake's Objections at 17-18. After hearing the evidence, Magistrate Callahan determined that "[i]n my view, Bostic's word is good on the issue. I am persuaded that Blake was advised of his *Miranda* rights prior to admitting that he owned the nine millimeter pistol." Recommendation and Order at 135.

After reviewing the transcripts of the April 3, 1998 hearing, the court finds no reason to question Magistrate Callahan's determinations. If after a careful review of the record a "district court is satisfied with the magistrate judge's findings and recommendations it may in its discretion treat those findings and recommendations as its own." *Goffman v. Gross,* 59 F.3d 668, 671 (7th Cir.1995) (citing *United States v. Raddatz,* 447 U.S. 667, 676, 100 S.Ct.

2406, 65 L.Ed.2d 424 (1980)). Thus, "[t]he district court is not required to conduct another hearing to review the magistrate judge's finding or credibility determinations." *Id.* (citing *Raddatz,* 447 U.S. at 676, 100 S.Ct. 2406). The court will adopt Magistrate Callahan's determination that Blake was made aware of his *Miranda* rights, while at the same time echoing the magistrate's admonition that the Fox Lake Police department quickly resolve this "most disturbing" set of circumstances. Recommendation and Order at 135. Accordingly, Blake's motion to suppress will be denied.

IX. Morgan's Motion to Suppress, Recommendation and Order at 134-47

Morgan objects to the magistrate's recommendation that this court deny his "Motion to Suppress Any Evidence Seized as a Result of September 3, 1994 Automobile Stop and Search." The magistrate found that the law enforcement officer made a reasonable *Terry* stop of the car Morgan was traveling in after the officer observed the car, full of Outlaws, drive slowly past their rivals' (the Sons of Silence) clubhouse at least the second time that day.

Morgan first argues that the stop was not reasonable because of the existence of a "few facts" worth noting, or rather, absence of facts – i.e., that the officer did not have a search warrant, that he did not observe the Outlaws commit any traffic violations, that he hadn't received a dispatch or tip that the Outlaws were engaging in any illegal activity, and that the officer did not observe the Outlaws raising their firearms. Objections to the Magistrate's Recommendation as to Defendant's Motion to Suppress Evidence (hereinafter "Morgan's Objections") at 2. However, none of these are required before an officer

may make a *Terry* stop, e.g., he need not wait until guns are raised and bullets are flying to intervene.

Morgan further argues that a suspicious vehicle slowly driving past a building is not adequate to justify a *Terry* stop. *See United States v. Posey,* 663 F.2d 37 (7th Cir.1981). The magistrate distinguished *Posey* because of the presence of additional facts creating reasonable suspicion in the present case that were lacking in *Posey*: the officer here knew that the Outlaws and the Sons of Silence were engaged in a gang war; he knew that a member of the Outlaws had been shot recently; he knew that a member of the Hell's Henchmen, a group associated with the Sons of Silence, had been shot recently; and he had reason to believe that the Outlaws had driven past their rivals' clubhouse several times that day.

The court agrees that *Posey* is distinguishable on its facts. The court also finds that *Posey* is further distinguishable because the *Posey* court did not explicitly hold that driving slowly past a place does not justify a *Terry* stop, but instead assumed that it did justify a stop but that the justification evaporated by the time the officer stopped the vehicle: "Even assuming arguendo that Posey's conduct in Steele constituted justification for a Terry stop, that justification had evaporated by the time of the stop." *Posey,* 663 F.2d at 41. Not only did the officer in this case make a much quicker stop than in *Posey,* but the whole "evaporation" doctrine has since been called into "considerable doubt" by the Seventh Circuit. *United States v. Feliciano,* 45 F.3d 1070, 1074 (7th Cir.1995). Therefore, the court holds that the officer formed an articulable and objectively reasonable suspicion that the Outlaws were potentially dangerous, and the court will adopt the magistrate's recommendation on this point.

Finally, Morgan argues that the duration and extent of the *Terry* stop "converted this stop into an arrest without probable cause as well as a warrantless search and seizure without probable cause." Morgan's Objections at 3. The magistrate correctly stated that the search did not need to be justified by probable cause but instead was justified by the officer's reasonable suspicion that the Outlaws were potentially dangerous. Furthermore, as the magistrate noted, even approaching a suspect with guns drawn, asking the suspect to enter a police car and drive around with the police, and detaining him for over an hour has been considered to be a reasonable *Terry* stop and not an arrest. *Vega,* 72 F.3d at 515-16. Although the Seventh Circuit noted that such a stop may "approach the outer boundaries of a permissible Terry stop," *id.* at 515, the stop in this case was certainly within those outer boundaries, especially considering that the driver of the car called out to the approaching officer that the inhabitants of the car were armed. Therefore, the court will adopt the magistrate's recommendation and will deny Morgan's "Motion to Suppress Any Evidence Seized as a Result of September 3, 1994 Automobile Stop and Search."

X. Motion to Suppress Evidence Obtained in Search of the Janesville Clubhouse, Recommendation and Order at 147-175

Defendants McVay, Kruppstadt, Meinen, Blake, O'Neill, Powers, and Hanson object to Magistrate Callahan's recommendation that this court deny their motion to suppress the evidence obtained in the June 10, 1997 search of the Outlaws' clubhouse located in Janesville, Wisconsin. Defendants' Objections to the Magistrate Judges's Report and Recommendation Regarding the

Defendants' Motion to Suppress Evidence Seized From the Janesville Clubhouse (hereinafter "Defendants' Objections"); Recommendation and Order at 175.

In evaluating the government's search of the clubhouse, Magistrate Callahan first determined that the government did not have a valid justification to perform a protective sweep of the clubhouse subsequent to the arrest which took place on the front lawn of the clubhouse. Recommendation and Order at 167. The magistrate reasoned that pursuant to the Supreme Court's protective sweep doctrine as set forth in *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), the arresting officers' protective sweep did not fall within the definition of a search which is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* at 327, 110 S.Ct. 1093. However, because the government has not objected to Magistrate Callahan's recommendation on that issue, the court will adopt that recommendation as a matter of course. *See Banta Corp.,* 915 F.Supp. at 81.

Magistrate Callahan then determined that Ronald Lundgren, one of the occupants of the Outlaws' Clubhouse at the time that it was searched, consented to the so-called protective sweep of the residence. Recommendation and Order at 170. The defendants object to this determination, arguing that Magistrate Callahan should have relied upon Lundgren's assertions that the arresting officers did not obtain his consent before proceeding with the protective sweep. In making his final determination, Magistrate Callahan relied upon ATF Special Agent David Balkema's testimony as to the events which transpired on the front lawn of the Outlaws' Clubhouse. March 24, 1998 Transcript at 182-240. Agent Balkema recalled that Lundgren

consented to the search and that Lundgren's demeanor had been "agreeable" throughout the interaction. March 24, 1998 Transcript at 186. Magistrate Callahan and the defendants acknowledge that in the final analysis, the legality of the protective sweep hinges on whether or not Lundgren consented to the search. Recommendation and Order at 169; Defendant's Objections at 17-19. As the defendants acknowledge in their objections, the court does not have to exercise its *de novo* discretion in reviewing the credibility determination made by the magistrate judge. *Raddatz,* 447 U.S. at 676, 100 S.Ct. 2406. Indeed, the court may give the magistrate's credibility determinations such weight "as their merit demands." *Id.* at 683, 100 S.Ct. 2406.

Magistrate Callahan made a difficult factual determination when he found that Lundgren consented to the search of the Outlaws' Clubhouse. The magistrate noted that various witnesses gave conflicting accounts of the events which transpired immediately before the federal agents conducted the protective sweep, finding that "[n]either Casey nor Lundgren are without flaws in their credibility." Recommendation and Order at 169. However, after weighing the testimony, the magistrate determined that Lundgren did consent to the government's protective sweep of the clubhouse. *Id.* at 170.

After reviewing the relevant portions of the hearings in this case, the court agrees with the magistrate. The court realizes that Lundgren and Casey offer different versions of the events which occurred outside of the clubhouse on the morning of the June 10, 1997. *See* March 18, 1998 Hearing Transcript at 11-62; March 24, 1998 Transcript at 138-173. Additionally, the court notes that both witnesses had personal and/or professional reasons to

potentially color their testimony in an attempt to validate or invalidate the government's protective sweep. However, the court agrees with the magistrate that Agent Balkema's testimony proves the most credible.

After reviewing the record in this case, the court does not see any reason to set aside Magistrate Callahan's sound credibility determination. Taken as a whole, Agent Balkema's testimony seems more internally and externally consistent than does Lundgren's testimony. For example, both parties agree that Lundgren came out of his house, put away the guard dogs, and then opened the front gate in order to allow the police officers to arrest Allen McVay. These facts indicate that Lundgren adopted an "agreeable" demeanor throughout the arrest and protective sweep. If Lundgren were of a mind to contest the arrest and protective sweep, he never would have opened his front door and restrained the dogs. Therefore, this court accepts Magistrate Callahan's considered credibility determination that when the police officers asked if they could conduct a protective sweep, Lundgen consented to the search.

Finally, Magistrate Callahan determined that Magistrate Crocker had sufficient probable cause to issue the June 10, 1997 search warrant for the Outlaws' Clubhouse. The defendants object to Magistrate Callahan's refusal to invalidate Magistrate Crocker's search warrant, contending that Magistrate Crocker relied on illegally obtained evidence from the early morning protective sweep of the Outlaws' clubhouse and that Magistrate Crocker committed clear error by relying on tainted information as a basis for the search. Defendants' Objections at 19-20.

Initially, the court notes that Magistrate Callahan evaluated the defendants' objections using the correct

standard of review. As the Supreme Court reaffirmed in its *Gates* decision, "a magistrate's determination of probable cause should be paid great deference by reviewing courts." *Illinois v. Gates,* 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (citing *Spinelli v. United States,* 393 U.S. 410, 419, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)). Therefore, "so long as the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Id.* (citing *Jones v. United States,* 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)).

A review of the information that Magistrate Crocker had before him when he made his probable cause determination shows that he had a substantial basis for concluding that a search of the Outlaws' Janesville Clubhouse would reveal evidence of wrongdoing. Magistrate Crocker relied upon an affidavit from a confidential informant who had been in the clubhouse and reported that the Outlaws kept important records at that location. Recommendation and Order at 172. The confidential informant also reported that the Outlaws' clubhouse contained many photographs and other indicia of Outlaw membership. *Id.* Therefore, the court agrees with the government that even without the corroborative evidence obtained from the voluntary protective sweep of the Outlaws' clubhouse, Magistrate Crocker had enough information to justify the issuance of the search warrant. *See* Government's Response at 12. Although the corroborative evidence bolstered the reliability of the confidential informant, the informant had already proved his reliability on more than 50 prior occasions. Recommendation and Order at 172. Especially when viewed in light of the deference that a reviewing court must give to a magistrate's probable cause determination, the

court does not have any reason to invalidate the June 10, 1997 search warrant.

XI. Objections to "Indicia Warrants," Recommendation and Order at 186 and 193

Kruppstadt further objects to the nature of the "indicia" search warrants, an objection which he says relates to the search of the 1228 Hayes Avenue premises (Recommendation and Order at 184-186) as well as to the search of the Outlaws' clubhouse at 1263 Cherry Street, Janesville, Wisconsin (Recommendation and Order at 193). The magistrate rejected this "indicia" argument, stating that although the affidavit supporting the warrant application may have failed to demonstrate probable cause pursuant to *United States v. Rubio,* 727 F.2d 786 (9th Cir.1983), the evidence seized pursuant to the "indicia" warrants should not be suppressed pursuant to the good faith rule of *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Recommendation and Order at 193.

Kruppstadt objects, taking the court through a long discussion of the *Rubio* case and of why the search warrants here were invalid pursuant to *Rubio.* Kruppstadt's Objections at 7-12. However, Kruppstadt fails to address *Leon* or the good faith exception anywhere in his objections. Therefore, the court will adopt the magistrate's recommendation on this point and will deny the motions to suppress to the extent that they are based on the "indicia" argument.

XII. CONCLUSION

Accordingly,

IT IS ORDERED that O'Neill's "Omnibus Motion to Suppress Evidence Intercepted or Gathered Under Title III" (Docket No. 355) be and the same is hereby DENIED in part and GRANTED in part;

IT IS FURTHER ORDERED that Blake's "Motion to Suppress Evidence Under *Franks v. Delaware*" (Docket No. 367) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Powers' "Motion to Suppress Evidence Obtained through March 12, 1995, Warrantless Stop and Search of Automobile" (Docket No. 389) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Miller's "Motion to Dismiss Indictment and/or Suppress Evidence Due to Outrageous Government Conduct" (Docket No. 372) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Miller's "Motion to Suppress Physical Evidence and Fruits of Unlawful Searches, Surveillances and Seizures" (Docket No. 373) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Miller's "Motion to Suppress Statements" (Docket No. 374) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Morgan's "Motion to Suppress Evidence Seized as a Result of the March 8, 1995, Arrest, Search and Seizure in Evidence in Gary, Indiana" (Docket No. 360) be and the same is hereby GRANTED in part and DENIED in part;

IT IS FURTHER ORDERED that Kruppstadt's "Motion to Suppress Evidence Seized as a Result of the Search of 1228 Hayes Avenue, Racine, Wisconsin" (Docket No. 363) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Mroch's "Motion Challenging a Search Pursuant to a Warrant of 7332 W. 59th Street, Summit, Illinois" (Docket No. 346) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Meinen's "Motion to Suppress Physical Evidence" (Docket No. 350) be and same is hereby DENIED;

IT IS FURTHER ORDERED that Meinen's "Motion to Suppress Statements" (Docket No. 349) be and same is hereby DENIED;

IT IS FURTHER ORDERED that Blake's and O'Neill's "Motion to Suppress Under *Draper v. United States* and *Miranda v. Arizona* Any and All Oral, Written, Adopted or Recorded Statements and/or any Evidence Seized from [their respective] Persons and/or Vehicles by the Village of Fox Lake, Illinois, Police Department on February 10, 1994" (Docket No. 366) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Morgan's "Motion to Suppress Evidence Seized as a Result of Illegal Stop of Automobile, Arrest and Search on September 3, 1994" (Docket No. 358) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that McVay's, Kruppstadt's, Meinen's, Blake's, O'Neill's, and Power's "Motion to Suppress Physical Evidence Seized on June 10, 1997, at 1263 Cherry Street, Janesville, Wisconsin" (Docket No. 370) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that Kruppstadt's, McVay's, Meinen's, Hanson's, O'Neill's, Power's and Blake's "Motion to Suppress Physical Evidence Seized on June 10, 1997, at 1263 Cherry Street, Janesville, Wisconsin" (Docket No. 363) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that defendants' motions to adopt each others' Round II objections be and the same are hereby GRANTED;

IT IS FURTHER ORDERED that pursuant to the court's determination that the government did not timely seek subsequent authorizations for Title III surveillance regarding crimes not listed in the original authorizations, all counts of the indictment be and the same are hereby DISMISSED;

IT IS FURTHER ORDERED that the defendants detained on the offenses charged in the indictment be and the same are hereby provisionally released from custody; and

IT IS FURTHER ORDERED that the order releasing defendants be and the same is hereby STAYED for 30 days.

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52 F.Supp.2d 954

United States District Court,
E.D. **Wisconsin**

UNITED STATES of America, Plaintiff,
v.
Kevin P. O'NEILL, et al., Defendants.

No. 97-CR-98.

April 7, 1999.

Eric J. Klumb, Paul L. Kanter, Milwaukee, WI, for plaintiff.

James C. Reiher, von Briesen, Purtell & Roper, Milwaukee, WI, for Johnson F. Blake.

Robert J. Penegor, Cameron & Penegor, Brookfield, WI, for James E. Hanson.

Mark S. Rosen, Rosen & Holzman, Waukesha, WI, for David A. Kadlec.

Pamela Pepper, Cubbie & Pepper, Ltd., Milwaukee, WI, for Allen J. McVay.

Franklyn M. Gimbel, Gimbel, Reilly, Guerin & Brown, Milwaukee, WI, for Randall E. Miller.

Thomas Halloran, The Schoreder Group, S.C., Waukesha, WI, for William B. Brock.

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Daniel Resheter, Attorney at Law, Milwaukee, WI, for Robert A. Kruppstadt.

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Edward J. Hunt, Hunt Law Office, Milwaukee, WI, for Raymond L. Morgan, Jr.

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Lew A. Wasserman, Wasserman Law Office, Milwaukee, WI, for James W. Schneider.

William O. Marquis, Milwaukee, WI, for Kevin P. O'Neill.

Dean A. Strang, Fitzgerald & Strang, Milwaukee, WI, for James C. Rostron.

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ORDER

STADTMUELLER, Chief Judge.

If wishes were Harleys, defendants, members of the **Outlaws** motorcycle gang, might ride into the sunset, leaving this case behind . . . but wishes are not Harleys, nor do most of defendants' latest objections, which amount to little more than wishes, entitle them to relief. Defendants raise a host of challenges to Magistrate Judge William E. Callahan, Jr.'s November 23, 1998 orders and February 3, 1999 recommendation and order in this, the fourth and final round of motions ("Round IV"), few of which bear fruit. The court will address the issues in the same order as presented by the magistrate where possible.

I. MAGISTRATE CALLAHAN'S NOVEMBER 23, 1998 ORDERS

On November 23, 1998, Magistrate Callahan issued two orders, an "Order Re: Robert G. Lebell's Motion to Withdraw As Counsel" ("LeBell Order"), in which the magistrate denied James E. Meinen, Jr.'s counsel Robert LeBell's motion to withdraw, and an "Order Re: Government's Motion to Confirm and Continue Release and Detention Status of Defendants" ("Detention Order"), in which the magistrate granted the government's motion and ordered that the detention orders and bond conditions previously set under the original indictment shall remain in effect and unchanged under the superseding indictment. Defendants O'Neill, Meinen, McVay, Kruppstadt, Mroch, Hanson, Miller, Morgan, and Blake appeal from the Detention Order (and/or adopted others' appeals), and LeBell appeals from the LeBell Order. The government responds to the defendants' appeals from the Detention Order.

This court postponed ruling on these appeals while the Seventh Circuit contemplated similar issues on the defendants' appeals from this court's October 19, 1998 and November 2, 1998 orders. On December 24, 1998, the Seventh Circuit dismissed the appeals. On February 5, 1999, the Seventh Circuit issued an opinion explaining the reasons for its dismissal, but it declined to address the defendants' central argument, which is the same argument they raise in their appeals from the Detention Order, that the current indictment is not a superseding indictment but rather a new indictment:

> The defendants argue vociferously that this was a "new" indictment, because the old one had been dismissed, while the government labels it a

> "superseding" indictment. While there may be a difference between these two animals, we do not find it important for the matter presently before us, and we therefore decline the invitation to enter this part of the fray. Whatever type of indictment it was, the defendants were arraigned under it on November 19 and 20, 1998.

United States v. Powers, 168 F.3d 943, 945-46 (7th Cir.1999).

The Seventh Circuit also explicitly avoided ruling on the Detention Order, holding that the defendants' notices of appeal "do not suffice to bring before this court any challenge to the magistrate judge's later order of November 23 continuing their detention under the November 10 indictment." *Id.* at 948-49. The Seventh Circuit thus reserved the consideration of this order for this court:

> It is true that the magistrate judge construed that indictment to be a superseding indictment and he concluded that it was not necessary for him to hold new detention hearings. Whether or not the judge properly interpreted the new indictment has nothing to do with the defendants' alleged rights under the October 19 order, which is the only one before us. . . . [B]oth parties will have ample opportunity before the district court to raise any points they have about the November 10 indictment, the continued detentions, or the merits.

Id. at 948-49. The mandate from these appeals issued on March 18, 1999 after the defendants elected not to file a petition for rehearing. Therefore, this court will now rule on the issues presented by the magistrate's November 23, 1998 orders.

A. The Detention Order

1. "New" Versus "Superseding" Indictment

The defendants first raise the largely semantic issue of whether the November 10 indictment is a "superseding" indictment, as this court, the magistrate, and the government has referred to it, or a "new" indictment, as the defendants wish to call it. The defendants do not rely on any authority in support of their argument other than a single sentence from the dicta of a concurring U.S. Supreme Court opinion stating that "[t]he term 'superseding indictment' refers to a second indictment issued in the absence of a dismissal of the first." *United States v. Rojas-Contreras,* 474 U.S. 231, 237, 106 S.Ct. 555, 88 L.Ed.2d 537 (1985) (Blackmun, J., concurring); *see also United States v. Hoslett,* 998 F.2d 648, 657 n. 11 (9th Cir.1993) (citing the same sentence from *Rojas-Contreras*); *United States v. Long,* 900 F.2d 1270, 1275 n. 4 (8th Cir.1990) (same). The defendants, however, neglect to put this dicta into its proper context – Justice Blackmun added in the next sentence that "the [Speedy Trial] Act nowhere refers to a superseding indictment, and seems to assume that dismissal of the first indictment will *precede* issuance of the second. See 18 U.S.C. §§ 3161(d)(1) and 3161(h)(6)." 474 U.S. at 237, 106 S.Ct. 555 (emphasis added). The point of Blackmun's distinction was simply that he believed that these Speedy Trial Act provisions did not apply to the situation the court faced in that case, not that criminal defendants are entitled to a "get out of jail free" card when indictments captioned as "superseding" indictments are issued after dismissals of original indictments, as defendants argue. *Cf. United States v. Duque,* 62 F.3d 1146, 1149 (9th Cir.1995) (rejecting contention that because of *Rojas-Contreras* dicta, second indictment issued before

dismissal of first indictment must be a "superseding" indictment).

More importantly, the Seventh Circuit, in discussing the same Speedy Trial Act provisions at issue in *Rojas-Contreras,* referred to an indictment returned *after* dismissal of an original indictment as a "superseding" indictment: "[S]ubsection 3161(h)(6) controls a situation where there is an *interval* between the time the original indictment is dismissed . . . and the *superseding* indictment is returned." *United States v. Horton,* 676 F.2d 1165, 1170 (7th Cir.1982) (emphasis added); *see also United States v. Menzer,* 29 F.3d 1223, 1228 (7th Cir.1994) (same); *United States v. Badalamenti,* No. S.S. 84 Cr. 236(PNL), 1985 WL 2572, at (S.D.N.Y. Sept. 19, 1985) (referring to a second indictment that would be returned after dismissal of a first indictment because of section 2517(5) violations, the same situation as in this case, as a "superseding" indictment). Therefore, the court holds that the second indictment in this case can properly be referred to as a "superseding" indictment.

The superseding-versus-new-indictment issue might have been an interesting and relevant debate if the Speedy Trial Act or the statute of limitations were the focus of defendants' appeals from the Detention Order, because those are the only situations in which it matters whether an indictment is a superseding indictment or a new indictment. *See, e.g., Rojas-Contreras, Hoslett, Long.* However, defendants fail to present any reason why the semantics of naming an indictment as "new" or "superseding" has any other relevance and instead offer fatuous and totally unsupported contentions such as that this court has no jurisdiction over the defendants if the indictment is called a new indictment rather than a superseding one.

Unless the defendants raise statute of limitations or Speedy Trial Act objections in their appeals of the Detention Order, however, which they have not, the second indictment is valid whether it is called the "superseding" indictment, the "new" indictment, or the "blue," "red," or "purple" indictment. As the Seventh Circuit held, "[w]hatever type of indictment it was, the defendants were arraigned under it on November 19 and 20, 1998," 168 F.3d 943, 945-46, and the court thus has jurisdiction over the defendants. *Cf. United States v. Marzano,* 537 F.2d 257, 271 (7th Cir.1976) (holding that "[o]nce the defendant is before the court, the court will not inquire into the circumstances surrounding his presence there").[1]

2. New Detention and/or Bond Hearings

The defendants also argue that they are entitled to new detention and/or bond hearings. Again, even if the court called the second indictment the "new" indictment instead of the "superseding" indictment, which the court does not believe is the required course of action, that would not entitle the defendants to the relief they seek. As the government correctly notes, the defendants are collaterally estopped (or prohibited by the "law of the case" doctrine) from relitigating these issues absent new information not previously before the court. *See United States v. Rosenberger,* 872 F.2d 240, 242 (8th Cir.1989) (holding that a ruling on pre-indictment motion that search and seizure were legal collaterally estopped defendant from

[1] This concept also bars relief for Meinen on his claim that he was unjustly deprived of a removal hearing before being sent from Illinois to Milwaukee for the November 19, 1998 hearing.

later moving to suppress evidence claiming that search and seizure were illegal); *Smith v. United States,* 406 A.2d 1262, 1263-64 (D.C.1979) (holding that "[f]or all intents and purposes, the instant case is the same action that was brought previously. We, therefore, find the application of the doctrine of the law of the case to be appropriate"); *United States v. Thoresen,* 428 F.2d 654, 665-68 (9th Cir.1970) (holding that even though a hearing to suppress allegedly illegally seized evidence occurred under a superseded indictment, the defendant may not relitigate the motion to suppress after reindictment); *United States v. Yung,* 786 F.Supp. 1561, 1564-65 (D.Kan.1992) (holding that when a court has given a party a full and fair opportunity to litigate a motion to suppress and then has decided the motion on the merits, the party may be estopped from bringing the same motion in subsequent litigation).

Similarly, in one of the only reported cases in which Fed.R.Crim.P. 12(h) was used (actually, Rule 12(b)(5), Rule 12(h)'s predecessor), the court disposed of motions made under the second indictment simply by referring to its discussion in the opinion issued under the first indictment. *See United States v. Schneiderman,* 106 F.Supp. 906, 926 (S.D.Cal.1952). In any event, the court will not preclude the defendants from reopening consideration of detention orders or bond conditions if they have new information that has a material bearing on those decisions (which they have not indicated). *See* 18 U.S.C. § 3142(f). Therefore, the court affirms the magistrate's order that no new detention/bond hearings are necessary.

3. Length/Manner of Detention

Aside from the new-versus-superseding issue, several defendants raise general objections to the length and manner of their detention in their appeals from the Detention Order.[2] Among those who raise these general objections, only O'Neill and Morgan cite any authority or even a theory (such as due process) that would allow them to achieve whatever relief they seek, presumably release from pretrial detention.

O'Neill cites two cases, *Parnell v. Waldrep,* 511 F.Supp. 764 (W.D.N.C.1981), and *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). Neither case helps O'Neill. *Parnell* is a section 1983 case dealing with convicted county jail inmates' rights to reading materials, legal assistance or law libraries, and exercise, none of which O'Neill contends are unavailable to him. O'Neill alleges that he has not been allowed to vote in violation of *McDonald,* but the Supreme Court actually held in *McDonald* that Illinois's refusal to furnish absentee ballots

[2] Interspersed with his general objections to the length of his detainment, Blake asks the court to lift the stay it imposed upon Magistrate Callahan's March 20, 1998 order setting Blake's bail in the amount of $350,000. The government responds that if Blake truly has raised sufficient property to satisfy the bond, he should immediately request a hearing. The government is correct. If Blake wants a hearing on this issue, the appropriate way to request it is not by appeal of an unrelated magistrate order but through a properly filed motion with attached documentation showing that Blake can post the required bond.

to pretrial detainees did *not* violate the detainees' constitutional rights, *see* 394 U.S. at 809-810, 89 S.Ct. 1404, so O'Neill is not entitled to relief on this basis, either.

Morgan raises the most lengthy objection to his detention, citing nearly twenty cases in which courts discussed whether detentions of various lengths violated due process. *See, e.g., United States v. Millan,* 4 F.3d 1038 (2d Cir.1993). But Morgan commits the cardinal sin of failing entirely to apply this string-cite chautauqua on the law to the facts of this case, thereby leaving the court to do its own analysis.[3] The court is aided, however, by Magistrate Callahan's thoughtful discussion of this issue in his February 3, 1999 Recommendation and Order Re: Round IV Motions ("Recommendation and Order"). *See id.* at 30-36.

The Seventh Circuit has held that "[t]o get to first base" on this issue, the defendant "must show that either the prosecution or the court has unnecessarily delayed in bringing the case to trial – maybe the prosecutor is stalling because he realizes his case is so weak that pretrial detention is the only punishment in fact he can impose on the defendant." *United States v. Infelise,* 934 F.2d 103, 104-05 (7th Cir.1991). In *Infelise,* the court held that the defendants "failed to make the required showing" because

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[3] To the extent Morgan further articulates his due process arguments in his Objections to the Magistrate's Recommendation and Order on Round IV of Pretrial Motions ("Morgan's Round IV Objections"), the court will discuss those in this section of this order. To the extent he argues that the defendants' detention violates the double jeopardy clause, however, the court will address those objections later in the order.

there were twenty defendants in the case, they were accused of a variety of serious crimes, the government's case was not weak, and the evidence was voluminous. *See id.* at 105.

The same may be said about this case. *See* Recommendation and Order at 32-35. However, the complicating factor is that the government bears some blame for the delay caused by the dismissal of the first indictment, which was not a factor in *Infelise*.[4] One of the cases Morgan cites, *United States v. Millan,* 4 F.3d 1038 (2d Cir.1993), is instructive in this regard. In *Millan,* the district court held that the defendants' continued detention beyond 22 months, a delay caused partly by mistrials due to government agents' misconduct (which government lawyers failed to timely disclose), violated due process. *See*

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[4] In his objection to the Round IV Recommendation and Order, Morgan objected not only to the government's "blunder" in causing the dismissal of the first indictment, but also to the government's alleged delay in providing some discovery material to defendants: "An additional blunder necessitating delay of this trial and extending incarceration of the defendants is the inexcusable delay in providing *Brady/Giglio* materials and other discovery." Morgan's Round IV Objections at 8. This single-sentence objection is just barely specific enough to trigger review of this issue under Fed.R.Civ.P. 72(b). *See Johnson v. Zema Sys. Corp.,* 170 F.3d 734, 739-42 (7th Cir.1999). The Seventh Circuit in *Johnson* also held, however, that if a jurisdiction has a local rule requiring a party to state the *basis* for such objection, as this district does (*see* Local Rule 13.03(c) (E.D.Wis.)), any failure to describe the basis for an objection relieves the district court of its obligation to conduct a *de novo* review. *See* at 742. An additional problem is this court's practical inability to assess the validity of this objection absent any argument or citation to authority or to the record. Therefore, the court will not attempt an unguided *de novo* review of the *Brady/Giglio* issue and will adopt the magistrate's recommendation on this point.

id. at 1040. The Second Circuit reversed, holding that the factor relating to the government's fault was not entitled to significant weight in the due process analysis because there was "no suggestion that this failure was intentional." *Id.* at 1045. The Second Circuit held that the defendants' high flight risk, the danger to any person or the community, and the absence of conditions of release (such as electronic surveillance) that would reasonably assure the appearance of the defendants and the safety of the community outweighed the 30 months or more of detainment and the government's share of the blame for causing the delay.

The court holds that *Millan* is persuasive and directly on point. As in *Millan,* there is no indication that the government's miscue was intentional, and one could argue that the misstep in this case was far less egregious than the government's mistakes in *Millan.* Furthermore, the government's flub only delayed this case a few months at most, with the rest of the delay attributable mainly to the "massive nature and complex scope" of the case. Recommendation and Order at 35. The defendants also must bear some blame in delaying the case through the time they have taken to prepare and to challenge the magistrate's and this court's rulings (by, for example, filing appeals adjudged moot by the Seventh Circuit). *See Infelise,* 934 F.2d at 104. Given the circumstances, this court finds that, as in *Millan,* the length of the detention and the government's partial fault in extending the time of this detention do not outweigh the defendants' flight risk, the danger to the community, and the absence of conditions of release that would reasonably assure the appearance of the defendants and the safety of the community, all findings the court has already made. Therefore, the court

affirms the magistrate's November 23, 1998 "Order Re: Government's Motion to Confirm and Continue Release and Detention Status of Defendants."[5]

B. The LeBell Order

Meinen's counsel, Robert G. LeBell, appeals from the magistrate's November 23, 1998 LeBell Order, in which the magistrate denied LeBell's motion to withdraw. The magistrate stated that although he was not insensitive to LeBell's statements regarding the "dramatic toll" this case is taking on LeBell's law practice, granting LeBell's motion to withdraw "would have a severe negative impact on the court's ability to process this criminal proceeding in an efficient and timely fashion." LeBell Order at 2. The magistrate also rejected LeBell's argument that his withdrawal was proper at that time because the November 10,

[5] In Morgan's Round IV Objections, he also argues that "the Magistrate's recommendation is wrong" because it "fails to adequately consider . . . the previous decision of the Seventh Circuit in *U.S. v. Portes,* and the decision of the United States Supreme Court in *Salerno.*" *Id.* at 10. In *United States v. Portes,* 786 F.2d 758 (7th Cir.1985), the Seventh Circuit stated that "at some point, the length of delay may raise due process objections and we urge that district courts expedite the trials of those detained pending trial." 786 F.2d at 768. Morgan neglects to add that the Seventh Circuit held in *Portes* that the defendant's due process challenge was premature and that the Seventh Circuit "express[ed] no opinion as to the length of detention which would be constitutionally impermissible." *Id.* at 768 n. 14. Similarly, in *United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the U.S. Supreme Court stated that it "intimate[d] no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Id.* at 747 n. 4, 107 S.Ct. 2095. Therefore, these cases are of absolutely no help to Morgan.

1998 indictment was a new rather than a superseding indictment.

To the extent LeBell objects on the basis that the November 10, 1998 indictment is a new rather than a superseding indictment, the court rejects this argument for the reasons previously stated in this order. *See* Section I(A)(1), *supra*. To the extent LeBell objects that this case is taking a "dramatic toll" on his law practice, this court, like Magistrate Callahan, is also sensitive to and appreciative of the great effort this case requires of all involved, including defendants' attorneys. However, LeBell states in his affidavit that as of December 7, 1998, he has spent over 300 hours on this case, which is not what this court would consider a crushing workload when spread over one and a half years (it comes out to an average of roughly 17 hours per month). Furthermore, this court agrees with the magistrate that any hardship this case has caused is greatly outweighed by the prejudice that would be done to Mr. Meinen, the court, and all others involved if the court allowed LeBell to withdraw from the case after 22 months of voluminous pretrial motions, rulings, discovery, etc. Therefore, the court affirms the magistrate's November 23, 1998 "Order Re: Robert G. Lebell's Motion to Withdraw As Counsel."

II. MAGISTRATE CALLAHAN'S FEBRUARY 31, 1999 RECOMMENDATION AND ORDER

A. Miller's Objection to Recommendation and Order at 2-4 and 55-63

The magistrate denied Miller's motion to disclose certain sealed court records and grand jury materials and Miller's motion to compel additional discovery. February 3,

1999 Recommendation and Order Re: Round IV Motions ("Recommendation and Order") at 4 and 63. Miller objects. The court will address each objection in turn.

Miller argues that the court should disclose or unseal the following: (1) redacted scheduling sheets reflecting all time that the grand jury that returned the second indictment (the "Schultz" grand jury) expended in any way on the investigation that led to this indictment, on hearing witnesses pertinent to this indictment, or on considering this indictment; (2) an explanation whether any of the grand jurors serving on the grand jury that returned the second indictment also served on the grand jury that returned the original indictment (the "Foerst" grand jury); (3) those portions of the grand jury minutes relating to the second indictment that are necessary to prove or disprove the Schultz grand jury's access to transcripts from proceedings in front of the Foerst grand jury that included references to or excerpts of communications intercepted pursuant to Title III wiretaps; and (4) an indication of what tape-recorded evidence was presented to the indicting grand jury.

The magistrate denied these requests because he personally reviewed *in camera* all the grand jury transcripts pertaining to the identity of the grand jurors that handed down each indictment and all the evidence that was presented to the second grand jury. The magistrate stated that he is satisfied that none of the grand jurors who sat on the Foerst grand jury were members of the Schultz grand jury and that all the evidence presented to the Schultz grand jury complied with the appropriate Title III disclosure requirements such that the problems plaguing the first indictment were not present in the second indictment.

Miller does not object to the magistrate's recommendation on the issue of grand jurors' identity. Therefore, the court will adopt the recommendation and order on that point. Miller's objection is essentially that he is not satisfied with the magistrate's *in camera* review of the materials presented to the grand jury. Miller argues that his counsel is entitled to review the materials to ensure that the government fully resolved the Title III problems with the first indictment.

Miller's position with respect to this objection is at odds with the position he took before the magistrate, in that he previously agreed to *in camera* review of the submissions made to the second grand jury. Miller has failed to show any particularized need for the grand jury materials, and the court fails to see why Miller needs to view the transcripts firsthand when previously he was willing to let the magistrate perform an *in camera* review. Therefore, I will adopt the recommendation and order on this point as well.

The government states that it has no objection to full disclosure of the entire record of the proceedings before Judge Clevert regarding disclosure and use of Title III intercepts. Therefore, the government is ordered to disclose transcripts and documents relating to those proceedings to the defendants. *See* Section II(B), *infra*.

The magistrate also denied Miller's motion to conduct additional discovery. Specifically, the magistrate denied 22 of Miller's 28 requests for discovery materials as moot, because the same requests were denied by the court in its March 11, 1998 Order. Miller does not object to this portion of the recommendation. Therefore, the court will adopt the recommendation and order on this point.

The magistrate specifically ruled on six of Miller's requests for additional discovery. The court will address each of these in turn:

(1) Request No. 19 sought the original audio and videotape recordings made of Miller, either by Title III authorization or by other means. Miller argues that the copies provided by the government have gaps or breaks and that his expert needs the originals to determine whether they contain any anomalies that may call the authenticity of the original recordings into question.

The magistrate recommended that the government be ordered to turn over two of the originals to Miller for testing by his expert (Steven Cain) under specified conditions: a government expert or technical operating officer must convey the tapes to Cain's laboratory, be present while the tapes are being examined, and take custody of the tapes during any breaks in the testing. Miller's expert also must provide a copy of his report to the government.

Miller objects, but only to the extent that the government must turn over two tapes – UC189A and UC189B. The court will adopt the recommendation and order on this point but orders that the government turn over Miller's other requested tapes as well, UC160, UC161, UC162, UC189, UC218, UC158, UC163, and UC205, under the same testing conditions described above.

(2) No. 20 sought the production of all the original recording and monitoring equipment used to transmit and record Miller. The magistrate denied this motion on the grounds that Miller has not shown that the alleged anomalies in the tapes are the result of the equipment, that the recording devices are covered by a qualified privilege, and that in any event, any paperwork indicating

exactly which equipment was used to record Miller has been destroyed. Therefore, the magistrate concluded that even if Miller could make a showing that he was entitled to the actual recording equipment, there would be no way to determine which equipment was used to record Miller.

Miller objects, arguing that at the very least the government should supply his expert with representative samples of the equipment that was used to record him. Miller also asks the court to compel the government to disclose the nature of the requested records that were destroyed.

None of Miller's arguments carry the day. First, Miller's expert cannot state for certain that the alleged anomalies in the tapes were the result of the equipment or just the tapes. Thus, it appears that his questions may arise from mere supposition. Second, the court fails to see why the government should bear the burden and expense of allowing Miller's expert to review the equipment when Miller's expert cannot state with certainty that the equipment produced the alleged anomalies. In addition, it is beyond question that the government has an interest in protecting such sensitive information from public disclosure including investigative techniques and equipment. *See Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); *United States v. Angiulo,* 847 F.2d 956, 983 (1st Cir.1988); *United States v. Fernandez,* 797 F.2d 943, 952 (11th Cir.1986); *United States v. Van Horn,* 789 F.2d 1492, 1508 (11th Cir.1986); *United States v. Harley,* 682 F.2d 1018, 1020 (D.C.Cir.1982). Additionally, Miller has failed to make any kind of substantial showing that his need for the recording equipment outweighs the government's compelling interest in keeping its investigations and investigative techniques from public disclosure.

Finally, even if the court were to order the government to turn over the equipment used to record Miller, complying with such a demand would be impossible given the fact that either the equipment or the records indicating the types of equipment used for recording have been destroyed. Therefore, the court will adopt the recommendation and order on this point.

(3) Request No. 21 sought any written agency records of any damage, modifications, or maintenance done to the recorders, accessories, and other related equipment used to make the recordings. The magistrate recommended denying this motion because the specific equipment cannot be identified and because any records pertaining to the equipment have been destroyed.

As stated above, either the records or the equipment have been destroyed. Therefore, in the unlikely event that the court were to order the government to produce the items for Miller, complying with such an order would be impossible. Therefore, the court will adopt this portion of the recommendation as well.

(4) Request No. 22 sought statements from the agents who made the recordings, describing exactly how each recording was produced and the conditions that existed at the time, such as:

a. the power source, etc.;

b. input, etc.;

c. environment surrounding recording, etc.;

d. background noise, etc.;

e. number of individuals involved in the conversation, etc.;

f. brand, format, place of purchase, etc.;

g. recorder operation, number of times recorder was turned on and off, etc.;

h. typed transcripts of the audiotape conversations, etc.

The magistrate recommended denying this request in part as moot and denying the request in part on the merits. Neither the government nor Miller objects to this portion of the recommendation and order. Therefore, I will adopt this portion of the recommendation and order as well.

(5) Request No. 23 sought all independent contemporaneous back-up audio and videotape recordings made by other equipment. The government states that it is willing to provide access to a single original of each recording for which a specific request and showing is made, subject to the same restrictions put on the other recordings. The magistrate recommended granting this request. Because none of the parties object, the court will adopt this portion of the recommendation as well. Therefore, in accordance with this motion, the government is directed to produce the originals of tape UC189A and UC189B subject to the restrictions found on page 58 of the magistrate's recommendation.

(6) Request No. 24 sought all documents itemizing the chain of custody of the recording and copying process of the original tapes and the sound recording devices utilized. The government responded by asking for Miller to clarify his request. Miller failed to do so. The magistrate recommended denying this request as moot. Miller does not object. Therefore, I will adopt this portion of the recommendation and order as well.

B. Kruppstadt's Objection to Recommendation and Order at 4, 8-11

Defendants Kruppstadt and O'Neill object to the magistrate's recommendation that the court deny their motion to unseal the documents surrounding the government's application and Judge Clevert's November 9, 1998 order authorizing the disclosure of the Title III intercept information to the Schultz grand jury pursuant to 18 U.S.C. § 2517(5). Objections to the Magistrate's Order Dated February 3, 1999, Regarding Defendant Kruppstadt's Motion to Unseal Court Records; Defendant O'Neill's Second Submission on Objections to Magistrate Judge Callahan's Recommendation and Order Re: Round IV Motions (hereinafter "O'Neills Second Submission") at 5-6. However, the government does not object to the disclosure of the application, stating that "considering how much has already been disclosed to the defense on this subject, there would appear to be little justification for maintaining secrecy." Government's Response at 1. Therefore, the court will grant Kruppstadt's and O'Neill's motion to disclose the contents of the government's October 30, 1998 application to present Title III intercepts to the grand jury and Judge Clevert's November 9, 1998 order authorizing the same.

C. O'Neill's First Objections to Recommendation and Order at 5-18

Defendant **Kevin O'Neill** objects to the magistrate's refusal to reconsider the question of whether the government's wire tap interceptions complied with Title III requirements. In refusing to consider O'Neill's arguments, the magistrate stated that "[the] question has already been resolved against O'Neill. I will not re-address it."

Defendant **Kevin O'Neill's** Objections to Magistrate Callahan's Recommendation and Order Re: Round IV Motions (hereinafter "O'Neill's First Submission"); Recommendation and Order at 11 n. 6. Although O'Neill contends that "there is no authority for not readdressing issues upon a dismissed indictment," O'Neill does not cite any authority supporting the proposition that aggrieved parties may relitigate motions after the government brings a new indictment. O'Neill's First Submission at 2.

Contrary to O'Neill's unsupported claim, the doctrine of collateral estoppel may prevent criminal parties from relitigating identical motions to suppress as they arise under a superseding indictment. *See, e.g., Smith,* 406 A.2d at 1263-64. In this case, O'Neill provides the court with neither evidence nor argument showing how the instant motion to suppress Title III evidence may differ from the motion litigated and denied as part of the "Round II" motions resolved by the court in its October 19, 1998 order. Additionally, O'Neill fails to show how the new indictment in this case differs from the previous indictment in such a way as to provide a new basis for motions to suppress Title III evidence. Therefore, to the extent that O'Neill seeks to raise successive and repetitive motions to suppress Title III evidence based on minimization, the court will deny the motions because the court has already resolved the issues and they have become the law of this case. *See Rosenberger,* 872 F.2d at 242; *see also Smith,* 406 A.2d at 1263-64; *Thoresen,* 428 F.2d at 665-68; *Yung,* 786 F.Supp. at 1564-65.

Additionally, the court will deny O'Neill's objection to the magistrate's recommendation as it relates to Judge Clevert's decision to authorize the disclosure of Title III information to the grand jury pursuant to 18 U.S.C.

§ 2517(5). The defendant failed to sufficiently state concrete arguments or legal authority disputing the magistrate's recommendation in violation of Local Rule 13.03(c). *See Johnson,* at 741-42.

However, the court will address the defendant's so-called "newly discovered issues" and evidence.[6] Courts may reconsider motions to suppress when new facts come to light. *See Rosenberger,* 872 F.2d at 242; 3 Charles Alan Wright & Arthur P. Miller, Federal Practice and Procedure, Federal Rules of Criminal Procedure § 676 (2d ed.1982). In this case, O'Neill attached an affidavit and several exhibits to his objections to the magistrate's recommendation. Although O'Neill first alluded to exhibits that could show that the government illegally monitored the so-called "bugged lamp" in his original motion to suppress Title III evidence filed on February 20, 1998, he had not disclosed the identity of these exhibits until he filed his objections to the Recommendation and Order on February 18, 1999.[7] Therefore, O'Neill effectively "sandbagged" Magistrate Judge Callahan, the government, and this court by choosing to withhold the identity of his

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[6] O'Neill also seeks to relitigate Title III issues surrounding the placement of an electronic listening device, contained in a lamp, into his house. O'Neill posits that perhaps "[w]hat the Court in its decision must have done is confused the confidential informant, Patricia Wolf with the cohabitant, Nanette Suchocki." O'Neill's First Submission at 3. The court, having reviewed its "Round II Order," finds no evidence of any such confusion. October 19, 1998 Order at 12-17. At the time that the government placed the inactive listening device inside of the lamp, Patricia Wolf owned the lamp. Government's July 30, 1998 Response at 5.

[7] For the court's decision as to the original "bugged lamp" motion to suppress, see the October 19, 1999 Order at pages 12-17.

"bugged lamp" evidence for almost one year. O'Neill further sandbagged the magistrate by first presenting his evidence in an objection to the Recommendation and Order. *See Thomas v. Arn,* 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (holding that ordinarily courts are not obligated to review evidence presented for the first time on appeal). The "same rationale that prevents a party from raising an issue before a circuit court of appeals that was not raised before the district court" applies to this situation as well. *Provident Bank v. Manor Steel Corp.,* 882 F.2d 258, 261 (7th Cir.1989) (citing *United States v. Schronce,* 727 F.2d 91, 94 (4th Cir.1984)). Even if O'Neill had not known of the actual existence of the documents that he attached to his current objections, he could have at least provided the court with a proffer of the nature of his "bugged lamp" evidence.

Ordinarily, the court would simply refuse to examine evidence not provided to the magistrate as part of an original motion made in the time and manner specified by the scheduling order and by local rule. *See Johnson,* at 741-42. However, the court realizes that despite O'Neill's inappropriate conduct, he remains in custody, and the cause of justice should not suffer because of what appears to be a thoughtless error of judgment. Therefore, the court will remand this motion to Magistrate Callahan for the limited purpose of conducting expedited briefing and, if necessary, a hearing to determine whether O'Neill's newly submitted evidence demonstrates that the government used the bugged lamp to intercept conversations or other substantive information regarding O'Neill becoming the Outlaws regional president before obtaining court authorization for the intercept. *See* "Affidavit of William O. Marquis in Support of Reply to Government's Response to

Motion to Dismiss and Suppress Under Title III." As part of the second round of motions in this case, the court resolved the legality of the government's placement of the listening device in O'Neill's home and of the government's pre-authorization monitoring of the signal in order to verify the successful installation of the device. *See* October 19, 1998 ("Round II") Order at 12-17. Therefore, the magistrate need not revisit those issues in conjunction with this limited remand.

D. O'Neill's Second Objections to Recommendation and Order at 5-18

In his second series of objections to the recommendation, O'Neill once again seeks to raise the same Title III arguments that the court considered as part of the "Round II" motions decided on October 19, 1998. *See* O'Neill's Second Submission. For the reasons stated above, the court will not join the defendant in his now second attempt to beat a dead horse. The doctrine of collateral estoppel prevents the defendant from re-visiting the "Round II" motions. *See Rosenberger,* 872 F.2d at 242.

Although O'Neill portends to object to many sections of the magistrate's recommendation, he neither offers statutory analysis nor cites case law in support of many of his broad and often wandering objections. Thus, the court will reject many of these objections without performing a *de novo* review. *See Johnson,* at 741-42; *United States v. Molinaro,* 683 F.Supp. 205, 211 (E.D.Wis.1988) ("[W]ithout specific reference to portions of the magistrate's decision and legal discussion on the objected portion, the district court's duty to make a *de novo* determination does not arise. The general statements that a party 'objects' and

'incorporates all arguments previously made to the magistrate' will not suffice."). Therefore, the court denies O'Neill's generalized objections that are dispersed throughout his lengthy submission. *See* O'Neill's Second Submission at 2-3, 8-9, 10-12.

However, in an overabundance of caution, the court will continue with a brief evaluation of O'Neill's largely unsupported and speculative objections. O'Neill objects to the government's presentation of "windfall" derivative evidence to the Schultz grand jury in obtaining the second indictment in this case. O'Neill asserts that the government illegally used information obtained from an unauthorized wire tap to encourage James Schneider to cooperate with the government and provide testimony in support of the second indictment. *See* O'Neill's Second Submission at 4, 6-7, 9-10. O'Neill contends that "Schneider agreed to testify only after the first indictment was handed down, in violation of Title III. Statements and testimony taken from Defendant Schneider are clearly the fruit of unauthorized Title III windfall evidence, its fruits, and the invalid indictment which was first gained based upon it." O'Neill's Second Submission at 5. O'Neill further explains the underlying rationale for his objections by asserting that "the defendant believes that the testimony presented to the first grand jury in violation of section 2517(5) will forever be tainted and cannot be reused." O'Neill's Second Submission at 7.

The government analogized these facts to the facts in *United States v. Ceccolini,* 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). In that case, the Supreme Court determined that "[e]ven in situations where the exclusionary rule is plainly applicable, we have declined to adopt a 'per se or "but for" rule' that would make inadmissible any

evidence, whether tangible or live witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest." *Ceccolini,* 435 U.S. at 276, 98 S.Ct. 1054 (citations omitted).

In evaluating the evidence in *Ceccolini,* the Supreme Court looked to several factors relating to the tainted evidence. These factors included: 1) whether the testifying witness made the decision to testify under her own free will; 2) whether a substantial amount of time passed between the illegal search and the initial police contact with the witness; 3) whether a substantial amount of time passed between the initial government contact with the witness and that witness' testimony at trial; 4) whether the government knew of the witness' identity and her relationship to the defendant; and 5) whether the government sought to discover the inadmissible evidence in order to coerce the witness into testifying. *See* 435 U.S. at 275-280, 98 S.Ct. 1054. In weighing these factors against one another, the Supreme Court applied a fluid analysis, reasoning that:

> Obviously no mathematical weight can be assigned to any of the factors which we have discussed, but just as obviously they all point to the conclusion that the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object.

Ceccolini, 435 U.S. at 280, 98 S.Ct. 1054.

In this case, the government responds to O'Neill's motion to suppress "windfall" evidence by showing that

the contested wire tap evidence does not incriminate James Schneider, that Schneider decided to testify for the government under his own free will and with advice of counsel, that Schneider testified before the grand jury three years after the Title III interceptions took place, and that Schneider chose to plead guilty to the charges in this case. *See* Government's Response at 8-9. In support of these contentions, the government attached an affidavit executed by ATF Special Agent Sandra DeValkenaere.

In analyzing the effect of these facts within the Supreme Court's *Ceccolini* rubric, the court finds that the government correctly presented Schneider's testimony to the second grand jury. The court finds no evidence that the micron-thin and largely hypothetical causal connection between Schneider's testimony and the government's unauthorized Title III disclosures to the first grand jury should play any role in limiting the validity of the second indictment. Therefore, the court will deny O'Neill's objections as they relate to the so-called "windfall" Title III evidence.

O'Neill also objects to the magistrate's recommendation as it relates to the presentment of grand jury transcripts from the Foerst grand jury proceedings to the Schultz grand jury. *See* O'Neill's Second Submission at 6-7. O'Neill contends that "the testimony presented to the first grand jury in violation of section 2517(5) will forever be tainted and cannot be reused." *Id.* However, O'Neill does not elaborate upon his argument that the transcripts have become tainted, leaving the court to conclude that the government properly presented the Foerst grand jury transcripts to the Schultz grand jury.

Section 2517(5) of Title 18 governs subsequent authorization for disclosure of Title III intercept information to other law enforcement bodies. Therefore, when the government presented Title III intercept information to the Foerst grand jury before it obtained subsequent authorization for disclosure pursuant to 2517(5), the grand jury, not the Title III evidence, became tainted. Therefore, the government successfully cured the Foerst grand jury defect by securing subsequent authorization to disclose the Title III intercept information pursuant to section 2517(5) and then presenting the information to the new, "uninfected" Schultz grand jury.

O'Neill further objects to "any rationale which seeks to allow evidence gained in violation of Title III and its unauthorized use to stand under any good faith exceptions." O'Neill's Second Submission at 7. In support of this motion, O'Neill claims that the magistrate's reading of *United States v. Puglia,* 8 F.3d 478 (7th Cir.1993), "takes us dangerously close to a *Leon* good faith exception." O'Neill's Second Submission at 7 (referring to *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). However, a review of the *Puglia* decision reveals that the Seventh Circuit held in that case that the exclusionary rule does not apply to grand jury proceedings. *See Puglia,* 8 F.3d at 482-83. Nowhere in the decision does the Seventh Circuit mention good faith exceptions to the exclusionary rule. *See id.* This analysis renders O'Neill's objections specious, and the court thus will deny his objections as to this concern.

Finally, O'Neill objects to the magistrate's finding that the government's application complied with the substantive requirements for a section 2517(5) post-interception application. In evaluating the government's application,

the magistrate found that the submission complied with the requirements set forth by the Seventh Circuit. *See United States v. Arnold,* 773 F.2d 823 (7th Cir.1985). The court, having reviewed the *Arnold* case and O'Neill's objections, finds that the objections bear almost no resemblance to the *Arnold* factors as discussed in the magistrate's recommendation. Therefore, the court will adopt the magistrate's recommendation and will deny O'Neill's objections as to the government's subsequent section 2517(5) application.[8]

E. Rostron's and O'Neill's Objections to Recommendation and Order at 19-27

Both Rostron and O'Neill object to the magistrate's approval of the manner in which the government presented information to the Schultz grand jury. *See* O'Neill's Second Submission at 5, 8-9; Defendant Rostron's Objections to Recommendation and Order (hereinafter "Rostron's Objections") at 2-7. In an effort to resolve the defendants' various objections to the manner in which the government conducted the Schultz grand jury proceedings, the parties agreed that the magistrate would undertake an *in camera* examination of the Schultz grand jury transcripts and that the magistrate would also review all the materials presented to the Schultz grand jury. *See* Recommendation and Order at 24-25.

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[8] However, the court will grant Kruppstadt's request to disclose the contents of the subsequent section 2517(5) disclosure application. *See* Section II(B), *supra.*

After reviewing all the pertinent information *in camera,* the magistrate concluded that in his opinion "the transcripts clearly reveal that the Schultz grand jury at all times functioned as 'the grand jury that the Fifth Amendment to the United States Constitution guarantees.'" Recommendation and Order at 26 (citing Rostron's Motion to Dismiss). Rostron objects to the magistrate's determination, claiming that "[i]n the end, the magistrate did not make a convincing argument that the Schultz grand jury truly acted as the independent buffer between citizen and the government that the Fifth Amendment requires in this complex case." Rostron's Objections at 7. This objection demonstrates that Rostron, O'Neill, and perhaps other defendants have misconstrued the true purpose and function of the grand jury in criminal prosecutions. The court finds that not even through the most tortured and perverse construction of applicable statutory and case law could the magistrate judge find himself in a position of having to "convince" the defendants to set aside their every qualm, real or imagined, regarding the minute details of the Schultz grand jury proceedings.

The court reminds the defendants that "because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside," the courts generally do not exercise supervisory authority over grand jury proceedings. *See United States v. Williams,* 504 U.S. 36, 47, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). Because the courts do not supervise the grand jury, "many constitutional protections afforded defendants in criminal proceedings have no application to grand jury proceedings because the grand jury is an accusatory, not adjudicatory, body." *Puglia,* 8 F.3d at 482 (citing *Williams,* 504 U.S. at 49, 112

S.Ct. 1735). Furthermore, "[g]iven the grand jury's operational separateness from its constituting court, it should come as no surprise that [the Supreme Court has] been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure." *Williams,* 504 U.S. at 49-50, 112 S.Ct. 1735. Therefore, the magistrate's acquiescence to conduct the *in camera* review of the grand jury proceedings extends far beyond the supervisory role envisioned by the Supreme Court in *Williams,* and this court will not entertain any further exploration or groundless supposition.

In addition, this court will not scrutinize the magistrate's careful review of the grand jury materials. The district court may decline to exercise its *de novo* discretion in reviewing a credibility determination made by the magistrate judge. *See United States v. Raddatz,* 447 U.S. 667, 676, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Indeed, the court may give the magistrate's credibility determinations such weight "as their merit demands." *Id.* If after a careful review of the record a "district court is satisfied with the magistrate judge's findings and recommendations it may in its discretion treat those findings and recommendations as its own." *Goffman v. Gross,* 59 F.3d 668, 671 (7th Cir.1995) (citing *Raddatz,* 447 U.S. at 676, 100 S.Ct. 2406). Therefore, the court will adopt the magistrate's recommendation and will deny Rostron's and O'Neill's objections as they relate to the adequacy of the Schultz grand jury proceedings.

F. McVay's and Morgan's Objections to Recommendation and Order at 28-36

Magistrate Callahan recommended that McVay's and Morgan's motion to dismiss the November 10, 1998

superseding indictment based on the double jeopardy clause of the Fifth Amendment be denied. *See* Recommendation and Order at 36. McVay objects, arguing that the magistrate erroneously rejected the double jeopardy argument in holding that jeopardy has not attached in any of the defendants' cases. *See id.* at 30. Morgan echoes this objection and adds that the length of his detention also violates his due process rights. To the extent Morgan (and/or McVay) argue that the detention violates due process, the court rejects this argument for the reasons the court previously stated in affirming the magistrate's November 23, 1998 Detention Order. To the extent McVay and Morgan argue that the magistrate was wrong in rejecting their double jeopardy argument, the court will now address that issue.

In this, the fourth and final round of our pretrial contest (where the questions are harder and the stakes are higher), the answer is, "denied for lack of case law or statutory support," and the correct question is . . . "What will the court do with defendants' double jeopardy argument?" In other words, the court holds that the magistrate was correct in finding that defendants' double jeopardy arguments must fail because "jeopardy has not yet attached in any of the defendants' cases." *Id.* at 30. The magistrate cited *Serfass v. United States,* 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975), for the bedrock principle that jeopardy does not attach before trial: "The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.'" *Id.* at 388, 95 S.Ct. 1055. The magistrate correctly held that jeopardy had not attached in any of the defendants'

cases because a jury has neither been empaneled nor sworn (nor indeed even become a gleam in Themis's blindfolded eye) and no trial court has begun to hear evidence, and therefore defendants' double jeopardy argument was without merit. *See* Recommendation and Order at 30.

Morgan objects that instead of relying on *Serfass,* the magistrate should have relied on the Supreme Court's more recent decision in *Hudson v. United States,* 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), because the *Hudson* Court overruled *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), in which the Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49, 109 S.Ct. 1892. Morgan notes that the *Hudson* Court overruled *Halper* in part because *Halper* required a comparison between the "sanction[s] actually imposed" under the civil and criminal proceedings, which "flies in the face of the notion that the Double Jeopardy Clause forbids the government from even '*attempting* a second time to punish criminally.'" 522 U.S. at 102, 118 S.Ct. 488 (emphasis in original) (quoting *Helvering v. Mitchell,* 303 U.S. 391, 399, 58 S.Ct. 630, 82 L.Ed. 917 (1938)).

The court is hard-pressed to determine what, if anything, these opinions have to do with this case, as the government has done nothing akin to imposing a criminal punishment and then seeking a punitive civil sanction. If these decisions have any relevance at all, they actually hurt Morgan's argument for the expansion of the double

jeopardy clause to cover alleged multiple criminal punishments before jeopardy attaches, because while the *Halper* Court expanded the double jeopardy clause to prohibit multiple punishments whether they were civil or criminal, the *Hudson* Court reversed that trend by reverting to the rule that only multiple criminal punishments offend the double jeopardy clause. *See Hudson,* 522 U.S. at 98, 118 S.Ct. 488 (noting that the Court granted certiorari "because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*"). Therefore, the court overrules Morgan's double jeopardy objection.

McVay also objects to the magistrate's rejection of his double jeopardy argument, but he takes a different approach than Morgan. McVay argues that Magistrate Callahan "erroneously" ignored "an entire series of cases which holds that the double jeopardy provision prohibits excessive pre-trial detention when that detention crosses the line from preventative measure to punishment." McVay's Objections at 2. McVay then string-cites seven cases that allegedly stand for this double-jeopardy proposition. In fact, none of these cases even mention the words "double jeopardy," much less stand for the proposition McVay says they represent.[9] Instead, these cases discuss

[9] This egregious mis-citation is a waste of everyone's time and a violation of the court's trust. The court must remind Mr. McVay's counsel that in the Seventh Circuit, "[c]riminal defendants and their lawyers must abide by the rules that apply to other litigants, including the principle that litigating positions must have some foundation in existing law or be supported by reasoned, colorable arguments for change in the law." *State of Wisconsin v. Glick,* 782 F.2d 670, 673 (7th Cir.1986) (citations omitted).

whether pretrial detention violates due process, an argument the magistrate and this court have already considered and rejected. Therefore, the court overrules McVay's objection and adopts the magistrate's recommendation on this point.

G. Mroch's and Kruppstadt's Objection to Recommendation and Order at 39-46

The magistrate denied Mroch's and Kruppstadt's motion to suppress evidence seized by law enforcement officers during the course of two searches. Kruppstadt argues that the evidence seized during the search of 1228 Hayes Avenue, Racine, **Wisconsin** on or about May 3, 1995 should be suppressed. Mroch argues that the evidence seized during the search of 7332 W. 59th Street, Summit, Illinois on or about June 10, 1997 should be suppressed. Mroch and Kruppstadt object.

As support for their arguments, both defendants claim that "the use of tape intercept material relating to offenses other than those specified in the order of authorization under Title III in obtaining a search warrant is testimonial and as such is barred absent judicial authorization prior to use." Mroch and Kruppstadt's Objection at 3. In effect, the defendants argue that the respective searches are "tainted" because the affidavits filed by Special Agent David J. Darin (in Kruppstadt's motion) and Detective Charles Wasko (in Mroch's motion) in support of the search warrant applications contained references to information that had been gathered during the course of the Title III intercepts but were not specified in the original wiretap authorization. The defendants claim that the evidence must be suppressed. The defendants cite 18 U.S.C. § 2517(3) and (5) in support of this argument.

The magistrate denied the motions on the grounds that the defendants could have made the motion as part of the Round II series of motions and that it was therefore untimely at this stage and on the grounds that the use of the evidence was appropriate pursuant to 18 U.S.C. § 2517(2) and (5). *See* Recommendation and Order at 41.

A plain reading of 18 U.S.C. § 2517 reveals that the defendants' arguments must fail. The use of any information received through a wiretap by law enforcement officers in connection with their preparation of an affidavit in support of a search warrant is not "testimonial" in nature such that prior approval of a judicial officer is needed. Section 2517(5) provides that if a law enforcement officer intercepts evidence pursuant to electronic communications, the contents or derivative evidence thereof may be used or disclosed as provided in subsection (2). Subsection (2) states explicitly that:

> Any investigation or law enforcement officer who, by means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. § 2517(2).

The "proper performance of his official duties" includes the use of the information for such uses as establishing probable cause to search. *See United States v. Vento,* 533 F.2d 838 (3rd Cir.1976). This is exactly what occurred in the present case. Therefore, both officers had every right to use the information gathered by electronic surveillance in their application for a search warrant.

Accordingly, I conclude that the magistrate was correct in his conclusions and will adopt this portion of the recommendation and order in full.

H. Rostron's Objections to Recommendation and Order at 46-50

Rostron objects to the magistrate's recommendation that his motion "should be denied out of hand since such a motion and affidavit could have been filed in a timely fashion." Recommendation and Order at 47. Rostron argues that "[e]ven if O'Neill's statements in the second affidavit would have been available back in May, 1998, Rostron cannot be expected to have moved in May, 1998 for severance from co-defendants on an indictment that was not even handed up until six months later." Rostron's Objections at 9. However, the court has already considered Rostron's motion for severance from **Kevin O'Neill** in the third round of pretrial motions decided on December 15, 1998. In "Round III," the court held that:

> Although the court does agrees that [O'Neill's] evidence might be somewhat probative, Rostron does not object to the magistrate's finding that all of the government's evidence will confirm that Rostron quit the **Outlaws** in October or November 1995. Recommendation and Order at 111-12. This finding suggests that evidence other than O'Neill's testimony exists which could prove what Rostron wants proven, so a severance would not be justified. *See United States v. Andrus,* 775 F.2d 825, 847 (7th Cir.1985) (finding no deprivation of fair trial by denial of severance motion when other evidence available). More importantly, if Rostron is not accused of staying in the **Outlaws** after that point, it does not appear that

> evidence refuting this "amount[s] to a dramatic and convincing exculpation," as is required to justify severance. *See United States v. Abraham,* 541 F.2d 1234, 1240 (7th Cir.1976). Therefore, the court will reject Rostron's objection and will adopt the magistrate's recommendation and order on this issue.

December 15, 1998 ("Round III") Order at 34. Because the parties have already fully litigated this issue and because the court has already issued an opinion on this matter, collateral estoppel prevents Rostron from raising the same arguments again. *See, e.g., Smith,* 406 A.2d at 1263-64. Therefore, the court will adopt the magistrate's recommendation and will deny Rostron's motion to sever.

As a final matter, Rostron submits a "proposed severance plan" which arranges the defendants into three groups for purposes of trial. *See* Rostron's Objections at 11-12. Rostron states that 13 of the 15 defendants have agreed to the plan. *See id.* at 12. Because Rostron submits the plan as a recommendation to the court, the court will take the recommendation under advisement should the court, for trial purposes, consider a discretional severance of the defendants in this case.

I. McVay's Motion for a Bill of Particulars and Extension of Time to File Notice of Alibi With Regard to Drug Conspiracy Count and Jensen's Objection to Recommendation and Order at 51-54

The magistrate denied Jensen's motion to exclude evidence or to dismiss the indictment. Jensen argues that the government has failed to provide him with significant portions of discovery material, including any plea agreements with any prospective government witnesses, any

information regarding offers or promises of any concessions or benefits to any of those prospective government witnesses, or any criminal histories of those witnesses. In effect, Jensen claims that the government has failed to produce exculpatory and impeachment evidence pursuant to the court's December 30, 1997 Order. Jensen has not objected to this portion of the recommendation and order. Therefore, I will adopt this portion in full.

The magistrate denied Jensen's motion on the grounds that if the government has failed to turn over any exculpatory evidence pursuant to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), none of the defendants have been prejudiced because a trial date has yet to be set in the case. The magistrate cautioned the government, however, to be more diligent in its disclosure of exculpatory material. *See* Recommendation and Order at 52-53.

The magistrate's conclusion is correct, but based on the number of seemingly inexplicable prosecutorial errors which have already occurred in this case, the court will reiterate what the government's obligations are regarding Jensen's motion. Pursuant to this order and the court's March 11, 1998 Order, the government must turn over to any defendant any *Brady* evidence of which it is aware or should reasonably be aware *as the evidence becomes available.* The government also must complete a review of its files and turn over to the defendants' counsel within thirty (30) days of this order any *Brady* material not previously disclosed.

McVay filed a motion with this court seeking a bill of particulars and an extension of time to file his notice of alibi with regard to the drug conspiracy count. McVay's

motion is based on his contention that it is impossible for him to provide the government with any alibi witnesses that he may call when he does not have the exact dates or times when he is alleged to have participated in the conspiracy.

McVay's motion presents a more complex problem. Obviously, the portions of the indictment alleging a drug conspiracy occurring at unspecified locations between January 1, 1989 and June 10, 1997 is extremely broad, making it nearly impossible for anyone to provide a list of alibi witnesses to refute such charges. The court believes this matter to be better resolved through more effective communication between counsel for the parties, including but not necessarily limited to the government identifying specific dates, events, or transactions relevant to their request for alibi witnesses related to the conspiracy in question. As a result, the court need not reach the merits of McVay's motion in this order and will deny the motion for a bill of particulars. The denial, however, is without prejudice. McVay may renew the motion if the information provided by the government does not reveal sufficient detail so that he might adequately notify the government of his alibi witnesses.

J. Mroch's Objection to Recommendation and Order at 64-66

The magistrate denied Mroch's motion for a speedy trial pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(c)(1). The magistrate based his decision on 18 U.S.C. § 3161(h)(8)(A), which permits a continuance of the time limits found within the Speedy Trial Act when "the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant

in a speedy trial." *See* 18 U.S.C. § 3161(h)(8)(A); Recommendation and Order at 66. Mroch objects.

Mroch's objection is essentially that he has been held for nearly two years without a trial. Mroch argues that he filed his demand for a speedy trial within 70 days on November 18, 1998, and that he should have been brought to trial by February 7, 1999.

The court is mindful of how long many of the defendants have been held without a trial. However, this case is extremely complex with seventeen defendants each represented by different counsel. Hundreds of motions have been filed by the defendants. The magistrate and this court continue to be faced with sophisticated legal questions regarding the admissibility of evidence and severance which cannot be decided without careful consideration given to both the government's right to prosecute the case and each defendant's constitutional rights. A primary example of this problem is best seen by referring to the court's dismissal of the first indictment on October 19, 1998.

Therefore, the magistrate was correct in deciding that the time limits applicable under the Speedy Trial Act must give way to the interests of justice in this case pursuant to 18 U.S.C. § 3161(h)(8)(A), and I will adopt this portion of the recommendation and order as well.

III. CONCLUSION

For the aforementioned reasons, the court rules accordingly on the defendants' objections. The court will continue its established practice of adopting without review any recommendation to which no objection is made.

See Thomas v. Arn, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (holding that "[s]ection 636(b)(1)(C) . . . does not require any review at all . . . of any issue that is not the subject of an objection").

Accordingly,

IT IS ORDERED that the motions to adopt submitted by defendants Blake (1006), Brock (835, 986 and 996), Hanson (857, 960, 975, 994 and 1026), Jensen (903, 1009, 1010), Kadlec (1007), Kruppstadt (1002), Meinen (971 and 1003), Miller (963), Morgan (967 and 1014), Mroch (1015), O'Neill (1016), Powers (980 and 985), Rostron (993), and Warneke (841 and 1017) be and the same are hereby GRANTED;

IT IS FURTHER ORDERED that defendant O'Neill's "Appeal from Magistrate's Order" (825) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that defendant McVay's "Objection to Magistrate Judge's November 23, 1998 Order Re: Government's Motion to Confirm and Continue Release and Detention Status of Defendants" (828) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that defendant Meinen's "Objections to Magistrate Judge's Order Regarding Government's Motion to Confirm and Continue Release and Detention Status of Defendants" (829) be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendant Meinen's "Objections to Magistrate Judge's Order Re: Robert G. LeBell's Motion to Withdraw as Counsel" (830) be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendants Kruppstadt's, Mroch's, Hanson's, Miller's, and Meinen's "Objections to the Magistrate's Order Dated November 23, 1998 Regarding Government's Motion to Confirm and Continue Release and Detention Status of Defendants" (831) be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendant Blake's "Objection to Magistrate Judge's November 23, 1998 Order Re: Government's Motion to Confirm and Continue Release and Detention Status of Defendants" (832) be and the same is hereby DENIED;

IT IS FURTHER ORDERED that defendant Morgan's "Objections to Magistrate William E. Callahan's Order Re: Government's Motion to Confirm and Continue Release and Detention Status of Defendants" (833) be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendant Morgan's "Amended Objections to Magistrate William E. Callahan's Order Re: Government's Motion to Confirm and Continue Release and Detention Status of Defendants, Amended to Correct Typographical Errors" (840) be and the same are hereby DENIED;

IT IS FURTHER ORDERED that Magistrate Callahan's November 23, 1998 "Order Re: Robert G. LeBell's Motion to Withdraw as Counsel" (813) be and the same is hereby ADOPTED and AFFIRMED by the court;

IT IS FURTHER ORDERED that Magistrate Judge Callahan's November 23, 1998 "Order Re: Government's Motion to Confirm and Continue Release and Detention Status of Defendants" (814) be and the same is hereby ADOPTED and AFFIRMED by the court;

IT IS FURTHER ORDERED that defendant Miller's "Motion to Compel Additional Discovery" (862) together with his objection (974) to the magistrate's partial grant and partial denial (959) of that motion be and the same are hereby DENIED in part and GRANTED in part and the magistrate's order be and the same is hereby MODIFIED as set forth in Section II(A) of this order;

IT IS FURTHER ORDERED that defendant Kruppstadt's "Motion to Unseal Judge Clevert's Authorization Order of November 1998" (859) together with his objection (989) to the magistrate's denial (959) of that motion be and the same are hereby GRANTED and the magistrate's denial be and the same is hereby VACATED as set forth in Section II(B) of this order;

IT IS FURTHER ORDERED that defendant O'Neill's "Motion to Dismiss Indictment and Suppress Evidence Gathered Under Title III" (860 and 881) together with his first objection (982) to the magistrate's recommendation (959) that the court deny that motion be and the same are hereby REMANDED to Magistrate Judge William Callahan for further hearings in accordance with Section II(C) of this order;

IT IS FURTHER ORDERED that defendant O'Neill's "Motion to Dismiss Indictment and Suppress Evidence Gathered Under Title III" (860 and 881) together with his second objection (992) to the magistrate's recommendation (959) that the court deny that motion be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendant Rostron's "Motion to Dismiss Second Indictment" (845) together with his objection (968) to the magistrate's recommendation

(959) that the court deny that motion be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendant Morgan's "Motion to Dismiss: Double Jeopardy" (838) together with his objection (978) to the magistrate's recommendation (959) that the court deny that motion be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendants McVay's, Blake's, Jensen's, Kruppstadt's, Meinen's, Miller's, Morgan's (838 and 874), Mroch's, O'Neill's, Powers's, and Warneke's "Motion to Dismiss: Double Jeopardy" (874) together with their objection (1004) to the magistrate's recommendation (959) that the court deny that motion be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendants Mroch's and Kruppstadt's motions to suppress (858 and 882) together with their objection (988) to the magistrate's recommendation (959) that the court deny those motions be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendant Mroch's "Demand for a Speedy Trial" (798) together with his objection (979) to the magistrate's denial (959) of that motion be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendant Rostron's "Renewed Motion Instanter to Sever Co-Defendants and Proposed Severance Plan" (894) together with his objection (968) to the magistrate's recommendation (959) that the court deny that motion be and the same are hereby DENIED;

IT IS FURTHER ORDERED that defendant McVay's "Motion for a Bill of Particulars and Extension of Time to

File Notice of Alibi" (1005) be and the same is hereby DENIED without prejudice;

IT IS FURTHER ORDERED that the defendants' remaining motions not accompanied by objections (850, 865-869, 876, 879, 883, and 906) be and the same are hereby DENIED, and the court ADOPTS the magistrate's recommendations as to each.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 97-CR-98

KEVIN O'NEILL,
ROBERT KRUPPSTADT,
et al.,

Defendants.

RECOMMENDATION AND ORDER RE: MATTER REMANDED BY CHIEF JUDGE STADTMUELLER

BACKGROUND

(Filed May 24, 1999)

On April 7, 1999, Chief Judge J.P. Stadtmueller issued an order that, in part, remanded to this court defendant Kevin O'Neill's motion to suppress "for the limited purpose of conducting expedited briefing and, if necessary, a hearing to determine whether O'Neill's newly-submitted evidence demonstrates that the government used the bugged lamp to intercept conversations or other substantive information regarding O'Neill's becoming the Outlaw's regional president before obtaining court authorization for the intercept. As part of the second round of motions in this case, the court resolved the legality of the government's placement of the listening device in O'Neill's home and of the government's pre-authorization monitoring of the signal

in order to verify the successful installation of the device. Therefore, the magistrate need not revisit those issues in conjunction with this limited remand."

Because I felt that the most expeditious way of handling this limited remand was to conduct a hearing, such hearing was conducted. Unfortunately, it took several days to complete the hearing. Specifically, the hearing was conducted on April 29, April 30, May 3, May 5, and May 10, 1999. During the course of the hearing, six witnesses testified. The witnesses were defendant Kevin O'Neill, Nanette Suchocki, Special Agent Sandra DeValkenaere, Special Agent Ronald Holmes, Special Agent Richard Brown and Alfred Williams. For the reasons which follow, I recommend that O'Neill's motion to suppress be denied.

THE TESTIMONY

Kevin O'Neill testified that during the early months of 1995 he was living at 3409 South Green Bay Road, Racine, Wisconsin. At that time, he was living with his girlfriend. Nanette Suchocki, her daughter, Kayla, and Nanette's younger sister Mandy. (Transcript p. 20). During the early months of 1995, specifically, in January 1995, O'Neill attended a funeral in Indiana. The funeral was for a member of the Gary, Indiana, Outlaws, one Don Fogg. At no time while he was in Indiana did he have any discussions with anybody concerning the regional presidency of the Outlaws.

According to O'Neill, he was in Joliet, Illinois, on Sunday, February 26, 1995. This was for a president's meeting. (Transcript p. 37). At that time, he and Randy

Yager had a discussion concerning the regional presidency. Specifically, Yager told O'Neill that he, Yager, was just filling in as regional president and that he did not really want to do it. The next day, February 27, 1995, after he had returned home to Racine, O'Neill had a discussion with Suchocki concerning the regional presidency. This conversation took place about two feet from a lamp that had a bug in it. This lamp had previously been brought to O'Neill's house by O'Neill. He had done so on February 7, 1995. (Transcript pp. 22-23). The conversation with Suchocki about O'Neill possibly taking the regional presidency was a very short one. And O'Neill did not talk to anybody else during this time period about his possibly serving as regional president of the Outlaws.

Within a day or two after O'Neill had this brief conversation with Suchocki, he, O'Neill, was paged by Yager. This page would have been on February 28th, March 1st or 2nd. When he called Yager back, Yager told O'Neill that "Ron Holmes was down in his area and he was asking Yager and some of the other members if [O'Neill] was the next regional president." (Transcript pp. 27-29). O'Neill testified that Yager was very evasive on the phone and told O'Neill that he wanted to talk to him in person. (Transcript p. 32). O'Neill and Yager did have one or two more telephone conversations that week, but because there was a party coming up on March 4, 1995, in Union Grove, Yager said that he would talk with O'Neill more about the Holmes/regional presidency matter in person. So it was agreed that they would talk on Saturday, March 4, 1995, at the party in Union Grove. (Transcript p. 32). On March 4, 1995, as soon as Yager arrived at the Union Grove Clubhouse, he

asked O'Neill to go into a separate room with him and there they talked about the matter of O'Neill's becoming regional president. At that time, Yager asked O'Neill, "Why is Holmes asking if you're going to be the next regional president?" (Transcript p. 48). O'Neill was embarrassed by the question and was shocked because the exact words of what he had said at his house on Monday, February 27, 1995, were being repeated to him by Yager. (Transcript p. 48).

Thereafter, according to O'Neill, he purchased equipment in an effort to detect whether there were any bugs in his home. This would have occurred sometime on or around March 6, 1995. At that time, he purchased an "RF detector." Between March and April, 1995, O'Neill used various devices in an effort to find any listening devices in his home. He did not detect any listening devices. He made these attempts approximately four times a day. (Transcript p. 50). At that point, he already had a couple of different detectors. Indeed, according to O'Neill, he has had "like six or seven different ones." (Transcript p. 51). He had purchased a number of these detectors earlier when he noticed that his garage door would open from time to time without his having pushed the garage door opener.

He first noticed the garage door opening in such fashion in January, 1995. At this same time, i.e., in or about January, 1995, he had also noticed the radar detector in his automobile start pinging "like from a submarine" when he would get halfway down the driveway. It would stop, but then, as he would back up, it would ping again. (Transcript p. 30).

With those other detectors, he could not find anything which would indicate that his house was being bugged. In April, 1995, he used one of the detectors and, at that point, discovered the bug which had been placed in the lamp, which lamp had been brought by O'Neill into his house on or about February 7, 1995. (Transcript pp. 51-52).

From January 1995 until O'Neill's discovery of the bug in April 1995, no one ever told him that his premises were being bugged. Other than, (1) his noticing his garage door opening without his turning on the garage door opener, (2) his noticing a pinging sound on his automobile radar detector as he was going down the driveway, and, (3) having Yager ask him about why Holmes would be knowledgeable of O'Neill's possible interest in the regional presidency, O'Neill had no other information that would suggest to him that his house was being bugged.

Nanette Suchocki also testified that she recalled a brief conversation with Kevin O'Neill sometime during the end of February, 1995, concerning his possibly becoming "a regional boss, where he would be in charge of more things." (Transcript p. 62). This conversation was very brief and in fact only lasted approximately five minutes. (Transcript p. 62). The conversation occurred while they were standing in the little foyer between the family room and her office. (Transcript p. 63). According to Suchocki, she did not tell anyone about the conversation that she and O'Neill had that day concerning the regional presidency. (Transcript p. 63).

Prior to the time of this particular conversation, Patricia Wolf, who at that time was acting as a government informant and whose nickname was "New York," came over to O'Neill and Suchocki's house. According to Suchocki, "she was there to get some information for someone at work. Surprised me that she was there. She's never stopped by just out of the blue, and I was wondering why she didn't call, so I thought that was kind of – you know, caught me off guard. I always expect notice that someone's coming over, by either a phone call or what not, even my brothers and sisters . . . I went and got her the information she needed, and that's when she asked about the lamp. I told her it was in the storage room and I haven't found a place for it yet." (Transcript p. 66). At that point, Patricia Wolf told Suchocki that she would help her remove it from the storage area and find a spot that looked good. They pulled out the stereo to expose an outlet and Patricia Wolf plugged the lamp in for Suchocki. (Transcript p. 67). According to Suchocki, the day that Patricia Wolf came over and plugged in the lamp was probably the Saturday following O'Neill's and Suchocki's return from Florida. Specifically, it would have been Saturday, February 25, 1995 (Transcript p. 76).

On recall examination, O'Neill also testified that the date Patricia Wolf came to their house would have been Saturday, February 25, 1995. He recalls this because he "was driving down the driveway and I came to the bottom, and she was just getting into her red Nissan and leaving. And I remember it because I was upset that she was even at my house."

Like O'Neill, Suchocki testified that during the months of January and February, 1995, she noticed

electrical problems in connection with her home. Specifically, she noticed that the garage door would be "mysteriously open in the morning"; that her "phone would click at a certain time every evening, and the radar detector . . . on Kevin's car – would kind of go crazy when we hit the bottom of the driveway." (Transcript p. 68). She also noticed that there were cars sitting directly across the street from her house which suggested to her that their home might have been being surveilled. (Transcript pp. 69-70).

Special Agent Sandra DeValkenaere ("DeValkenaere"), the lead agent in this investigation, also testified. She testified that on March 20, 1995, then-Chief Judge Terence T. Evans signed the order authorizing a Title III intercept of O'Neill's residence. DeValkenaere knew that O'Neill had taken from Patricia Wolf a lamp that had a bug in it. She knew this occurred on February 7, 1995. However, the government agents did not know, at that time, where O'Neill had taken the lamp. Specifically, they did not know if he had taken it to his house or, instead, had taken it to the Janesville Clubhouse.

At one point, she did have Patricia Wolf go to O'Neill's house to check to see where the lamp was. Although DeValkenaere did not know exactly when this was, she acknowledged that it could have been around February 25 or 26, 1995. (Transcript p. 101). Although DeValkenaere acknowledged sending Patricia Wolf over to the O'Neill residence to see if the lamp was there, she did not recall if she ever asked Patricia Wolf to report back to her regarding whether the lamp was there. In fact, she did not recall what Patricia Wolf may have said to her about seeing the lamp. She did testify, however,

that Patricia Wolf did not tell her that she, Wolf, had plugged it in; nor did she ask her, Wolf, whether it was plugged in. (Transcript p. 117). DeValkenaere did acknowledge that in an ATF report of investigation dated March 4, 1995, it was reported that Patricia Wolf, i.e., New York, had gone to O'Neill's residence, spoken with O'Neill's girlfriend, Nanette, for a brief period of time, and that she, Wolf, reported that she saw the lamp, which was located in the large conference room in the lower level of the house.

DeValkenaere testified that she sought and obtained equipment that would determine whether there were microwave emissions from O'Neill's residence. (Transcript pp. 93-95). This was for the purpose of determining if the bugged lamp had been plugged in at that location. In this connection, she contracted Richard Brown, an ATF technical operations officer. (Transcript p. 171).

After the equipment was received, it was put in the command post, and the people who were assigned to surveillance teams each day were instructed to take it out at least one time during their shift to determine if they could locate where the lamp had been plugged in. (Transcript p. 172.) This was done by ascertaining whether a microwave was emitting from the house. Initially, the agents did not know exactly where the lamp was because Patricia Wolf had been told by her husband, David Wolf, that Kevin O'Neill had talked about painting the lamp black and that he might put it at his office at the Janesville Clubhouse. (Transcript p. 172).

The first attempt to determine whether microwaves were emitting from O'Neill's home was on February 10, 1995. (Transcript pp. 143-145). At that time, no reading was obtained. Similarly, on February 13, 1995, the "microwave checks" all were negative. Likewise, on February 9, 1995, all checks for microwave emissions were negative. And no microwave activity was noticed on February 23, 1995.

This first indication that a signal could be received from the lamp bug was on March 2, 1995. (Transcript p. 173). It was first noticed by Special Agent Richard Brown, Special Agent Nicole Dildy and Milwaukee Police Department Detective Terrones at 1400 P.M. (Transcript p. 174). At that time, DeValkenaere was paged. (Transcript p. 174). DeValkenaere was paged at this time precisely because it was the first time that agents had actually detected the lamp being plugged in. (Transcript p. 175).

Thereafter, in a report dated March 3, 1995, microwave activity was also noticed. (Transcript pp. 145-148). It was noted on three different shifts of that date. (Transcript pp. 148-149). Again, on March 4, 1995, surveillance activity revealed that "at approximately 5:00 A.M. surveillance of Spike's residence indicated the monitor was working." (Transcript p. 151). Surveillance notes of March 5, 1995, again indicate, among other things, that "the microwave receiving unit revealed that the microwave at O'Neill's residence is active." (Transcript p. 152). Again on March 6, 1995, at 1:30 A.M., 2:00 A.M., 3:30 A.M., 4:00 A.M., and 6:30 A.M. "the monitor was found to be working." (Transcript p. 153).

In 1995, DeValkenaere did not believe that the agents had the capability of intercepting conversations with O'Neill's residence, either on the phone or through the bug, prior to getting technical assistance from the phone and power companies. (Transcript p. 178). DeValkenaere also testified that in 1995 she was not aware that the device that was being utilized by surveilling agents to detect whether or not the lamp bug was emitting a signal had the capability, either alone or in conjunction with other equipment, of intercepting oral communications. (Transcript pp. 176-177). In fact, she testified that she could not recall any conversation with anyone in 1995 during which even the possibility of that device being used to listen to conversations was discussed; nor did she recall any conversation with anyone during 1995 that suggested to her that anyone working with her on this investigation was intercepting conversations from the residence of O'Neill prior to March 22, 1995. (Transcript p. 177).

She testified that it was in preparation for this hearing that she first learned that the device that was used by the surveilling agents to detect whether or not the lamp bug was transmitting a signal could, if coupled with other equipment, be used to actually listen to conversation. (Transcript pp. 177-178). Indeed, she first learned of its capability to do so on April 28, 1999. (Transcript p. 178).

DeValkenaere testified that in 1995 she understood that the equipment that had been assigned to her and other agents for determining whether the lamp containing the bug had been plugged in only picked up radio frequency. She did not understand that it had the capability to be able to conduct aural monitoring. (Transcript p. 196). As

stated previously, this was her understanding up until April 28, 1999. (Transcript p. 196). As of the time of the hearing, however, it was DeValkenaere's understanding that the meter they had in 1995 could have detected oral conversations but, even at that, extra equipment would have had to have been plugged into it in order to do so. They did not have that equipment assigned to them. It was not available at the command post and, therefore, no oral communications were intercepted via the meter used to determine if the lamp was plugged in. (Transcript pp. 198-200). She testified that the first conversations intercepted pursuant to Judge Evans' order occurred on the afternoon of March 22, 1995.

She also testified that on April 21, 1995, she and other agents involved in this investigation met for the purpose of coordinating the conducting of approximately 50 interviews from on or about April 24th to on or about April 25th, 1995. At that time, she had prepared a list of questions for the investigators to ask various Outlaws and their associates. (Transcript p. 179). One of the questions pertained to Mr. O'Neill assuming presidency of the region. (Transcript p. 179, Exh. 23). She testified that the reason for the interviews and for these questions, including the one about O'Neill possibly being the regional president, was to "stir the pot" and thereby trigger conversations which would be relevant to the investigation, some of which conversations might be captured on the Title III intercepts being conducted at the Wolf and O'Neill residences. (Transcript p. 180). DeValkenaere testified that she believed Ron Homes was at the April 21, 1995, meeting. (Transcript p. 191). DeValkenaere also testified that she had O'Neill followed to a president's meeting around February 26,

1995. (Transcript p. 182). (Recall that O'Neill testified that he had attended a president's meeting in Joliet, Illinois on February 26, 1995, i.e. the day before he had the conversation with Suchocki concerning his possibly becoming the regional president.)

Special Agent Ronald Holmes also testified. According to Holmes, on June 26, 1994, he had a conversation with Randy Yager at the Illiana Speedway in Indiana. This was approximately two or three days after Peter Ray Rogers, also known as "Grease," had been shot off his motorcycle. Rogers, up to that point, had been the regional president of the American Outlaws Association. (Transcript pp. 257-58).

Holmes again interviewed Yager on November 26, 1994. The purpose of that interview was to ask Yager about the shooting that had taken place between the Hells Angels and the Outlaws earlier in October at a drag strip in Lancaster, New York. (Transcript p. 259). During the course of that interview, the subject of whether or not Yager was the regional president came up. Specifically, according to the report of investigation relative to such interview, which was marked and received as Exhibit 25, "[Holmes] asked Randy [Yager] if it were true that he, Randy Yager, was in fact the Chicago Regional President and he answered, 'no'" (Transcript pp. 259-60).

Again, according to Holmes, on February 28, 1995, March 3, 1995, and March 8, 1995, he interviewed Michelle Sandefur concerning the homicide of Sandefur's common law husband, Donald Fogg. Fogg, who was a member of the American Outlaw Association, was murdered on January 28, 1995. (Transcript pp. 260-61).

Holmes also interviewed Yager in connection with the Fogg homicide investigation. That would have been on February 13, 1994, i.e., approximately two weeks after the Fogg murder. During the course of his interview of Yager, the subject of the regional presidency came up. (Transcript pp. 262-63). At that time, Yager told Holmes that he, Yager, took the regional presidency on a temporary basis "because he was close to Chicago and he and Grease always knew each other pretty well." (Transcript p. 263). Holmes further testified that during his February 13, 1995, interview of Yager, other names as possible regional president came up; specifically, the names of Spike O'Neill, Jay Warneke and Ronald Talmadge. (Transcript pp. 264-65). Holmes acknowledged that, although Government Exhibit #27 recounts an interview with Yager on February 13, 1995, nowhere in that document does it indicate that Holmes talked to Yager about O'Neill, Warneke or Talmadge becoming regional president. (Transcript p. 272). Holmes also testified, however, that he knows that he did not speak with Yager during the period of time from approximately February 24 to March 3 or 4, 1995, concerning O'Neill's becoming regional president. He is certain of this because on February 13, 1995, Holmes had already been told by Yager that, in fact, Yager was the regional president. (Transcript pp. 277-78).

Holmes also identified Government Exhibit 28. That exhibit is a statement prepared by Holmes on April 27, 1995, regarding the April 26, 1995, interview of several Outlaws and their attorneys in Chicago. The interview was conducted as the result of a request from Special Agent DeValkenaere for Holmes to interview these Outlaws and

their attorneys and to ask several specific questions. It was DeValkenaere who provided Holmes with the specific questions to ask. Holmes did not know whether or not these particular questions were "concocted" at a meeting among people that were working on the investigation. One of the questions that Holmes was to ask was whether or not Spike O'Neill was the new regional president of the Chicago region. (Transcript p. 270).

Special Agent Richard Brown also testified. Brown testified that he has been a special agent with the Bureau of Alcohol, Tobacco and Firearms for little over 27 years. In addition to being a special agent, he also holds the title of Tactical Operations Officer. In that connection, he assists other agents with electronic surveillance. Although he has a basic familiarity with the electronic equipment that is used, he does not have any involvement with its design. (Transcript pp. 289-90).

During the first part of 1995, he was assigned to the St. Paul, Minnesota, ATF Office. During that period of time, he came to southeastern Wisconsin for the purpose of assisting Special Agent DeValkenaere on a possible Title III investigation. (Transcript pp. 290-91). In connection with that assignment, he was coming to Wisconsin two to three times a month. (Transcript p. 291).

Brown testified that he had no involvement in the installation of a bug in a lamp that went into the residence of Kevin O'Neill on February 7, 1995. That installation took place in the ATF Rockville, Maryland, Tactical Operations Branch. It was installed by an individual named Ralph Butler. (Transcript pp. 291-92).

Special Agent Brown testified that he had equipment that was capable "locally" of determining whether or not

the lamp was emitting a signal. That equipment was kept in a storage area in St. Paul, Minnesota. Brown brought the equipment to Wisconsin for the purpose of trying to determine the whereabouts of the lamp that Mr. O'Neill had taken possession of. (Transcript p. 292). According to Brown, the piece of equipment that he brought with him to determine the whereabouts of the lamp needed alternating current in order to operate. It was a box approximately 8" x 8" x 8". It also had a directional antenna attached to it, which had to be pointed at a spot in order to determine whether a signal was being emitted from the general vicinity of that spot. (Transcript p. 293). According to Brown, the device was able to pick up microwave frequency range waves. The device had an RF meter, i.e., radio frequency meter, which indicated when a signal was being detected. The device also had an audio output plug. (Transcript p. 294). This would be a common type of plug that people use in their home stereos. (Transcript p. 294).

In 1995, when Brown brought the device to Wisconsin from St. Paul, he did not know whether it could be utilized to, not only detect microwave transmissions, but also to listen to the content of any conversations that the transmitter (bug) might have been intercepting. (Transcript p. 294). It was Brown in 1995 who instructed the surveilling agents on how to use the device. He did not recall the subject of whether or not this device could be used to listen to conversations ever coming up during the period of time that he was in Wisconsin in 1995. (Transcript pp. 295-96).

While Holmes was in southeastern Wisconsin, he was personally involved in using the device to determine the location of the lamp. According to Holmes, "we would drive around certain areas trying to see if we could obtain the signal, watching the meter for any type of needle reflection."

(Transcript p. 296). Initially, the agents were unable to find any signal. Eventually, however, Brown, Detective Terrones, and Special Agent Nicole Dildy, detected a signal in the vicinity of Mr. O'Neill's residence. (Transcript pp. 296-97).

Most recently, Brown took steps, in conjunction with this hearing, to determine whether the device that had been used to detect microwave transmissions could in fact have been used to listen to conversations. In that connection, Brown called Ralph Butler and asked him whether or not audio could have been obtained via the audio jack on the device. (Transcript p. 298). Initially, Butler told Brown that any audio that would have been received would have been overdriven and it would have been distorted beyond being able to hear anything "legibly." (Transcript p. 299). As of Wednesday, April 28, 1999, this was the extent of Brown's understanding as to the device's ability to pick up oral communications. (Transcript p. 299). After Butler gave Brown this initial opinion, Brown called Butler back to verify his opinion. This was because Butler had advised Brown that he was going to run some tests to confirm what he had told Brown. On Thursday, April 29, 1999, Butler called Brown and told him that, in fact, tests revealed that one could hear audio without "any additional interface or continuation." However, because there is no speaker in the device one would need a pair of headphones or something comparable thereto in order to hear the audio and "you'd probably need an adapter of some type to adapt the headphone plug to the RCD phono plug on the receiver." (Transcript pp. 300-301).

Brown also testified that he was involved in the installation of the device that made it possible to listen from a remote (as opposed to local) location to conversations

picked up by the lamp bug. This was done, with the assistance of Wisconsin Power and Light personnel, on March 21, 1995. (Transcript pp. 301-304; Government Exhs. 30 and 31). As stated previously, Judge Evans signed the order authorizing interception of oral communications on the O'Neill residence on March 20, 1995.

On the last day of the hearing, Alfred Williams Jr. testified. After setting forth his experience in the electronics field, he testified that he examined the bug which had been removed from the lamp at O'Neill's residence. He described in some general fashion the manner in which the bug would have worked. Specifically, he opined that there were three microphones in the bug. He also testified that in order to transmit any conversations which were overheard by the bug, a transmitter would be needed. However, he did not know what type of transmitter was used in this case because he had never examined the remainder of the lamp. The only item which he examined was that which he had been provided, i.e., exhibit 20. However, he did testify that the frequency range of the transmitter that he surmised was in the lamp would have been in the "microwave region. Could be anywhere from hundreds of megacycles up to maybe a thousand." (Transcript p. 19). He stated that in order to pick up the microwave transmissions one would need a receiver. And that the "power of the transmitter and the sensitivity of the receiver would determine the range of communications." (Transcript pp. 19-20). He also said that, although it was "pretty hard to speculate", depending on the power of the transmitting device, it is possible one could pick up a scanner sensitive enough to pick up the transmitting device "like at Radio Shack . . . or some other place." (Transcript p. 20). In addition to a receiver, one would also

need an antenna, which could be purchased commercially, or could be made by use of a wire.

Mr. Williams did not offer any testimony concerning what the agents actually did when attempting to determine whether the lamp was plugged in. He did opine, however, that if one were to have installed a transmitter that operated at either 330 megacycles or 390 megacycles, like a common garage door opener, it could interfere with the garage door opener by constantly triggering it. (Transcript p. 33). He also testified that if the transmitter was constantly transmitting, one could pick it up on a telephone by hearing noises or beeps or things of that sort. That is to say, you could hear noises on the telephone line. However, the telephone would have to be off its cradle in order for one to hear the noises or the beeps. (Transcript pp. 16, 34-35).

ANALYSIS

O'Neill maintains that the government intercepted oral communications in his house before it had received court authorization to do so. His argument is founded on a sequence of events, which seems, in his view, too coincidental to be innocent: (1) there were a number of occasions in January and February, 1995, when his garage door opened without his having pushed his garage door opener; (2) during this same period of time his radar detector "pinged" as he drove down his driveway; (3) at about this same period of the time Nanette Suchocki noticed "clicking" sounds coming from her telephone while the receiver was still in its cradle; (4) on February 26, 1995, O'Neill and Yager spoke with one another at the Outlaws Joliet, Illinois clubhouse and one of the subjects discussed was

the regional presidency; (5) the next day, i.e. February 27, 1995, O'Neill and Suchocki had a brief conversation about O'Neill's possibly becoming the regional president, with such conversation taking place within close proximity to the bugged lamp; and, (6) within days of O'Neill and Suchocki's conversation of February 27, 1995, Yager asked O'Neill why ATF Special Agent Ron Holmes would be asking him about whether O'Neill was the regional president.

Even assuming that O'Neill and Suchocki are telling the truth about all of these events, that does not mean that the ATF intercepted oral conversations through the bugged lamp as early as February 27, 1995, i.e., well before court authorization for such interception had been obtained. In order for me to find that such interceptions occurred I must conclude that the government agents who testified at the hearing (or at least some of them) lied. Thus, it is necessary to analyze the testimony and, in the end, make certain credibility determinations.

There are some matters that are clearly not in dispute. First, on February 7, 1995, O'Neill took possession of the lamp which, unbeknownst to him, had a bug in it. Second, sometime thereafter (O'Neill and Suchocki say it was on February 25, 1995), Patricia Wolf came to their house and helped Suchocki find a location for the lamp and helped plug it in.

That the lamp was plugged in, however, does not mean that law enforcement agents were intercepting oral communications at that point. To be sure, the testimony adduced at the hearing revealed that they had the capability of doing so. But, Special Agent DeValkenaere, the lead agent in the case, testified, and I believe her, that she

didn't even know, at that time, that the device which she had obtained from Special Agent Brown was capable of picking up oral communications. Indeed, she did not learn that the device could do so until April 28, 1999. Moreover, even at that, earphones and an adapter would have been needed to pick up the oral communications; and the agents did not have such equipment assigned to them when they were using the device to check for microwave emissions.

Special Agent DeValkenaere's testimony was corroborated by Special Agent Brown who likewise did not know, until April 28, 1999, that the device he had brought to Wisconsin in early 1995 had the capability, with the use of headphones, to listen to conversations being picked up by the lamp bug in the O'Neill residence.

O'Neill suggests that Yager's questioning O'Neill about his interest in the regional presidency sometime shortly after February 27, 1995, is extremely troubling. It is so troubling, in fact, that O'Neill concludes Special Agent Holmes must have heard about O'Neill's passing interest in the regional presidency by way of interception of his conversation with Suchocki on February 27, 1995.

There is one major problem with O'Neill's theory. Special Agent Holmes testified that he did not speak with Yager at any time during the period from approximately February 24, 1995, to March 3 or 4, 1995, concerning O'Neill's becoming regional president. And we don't know what Yager would have testified to, because he was not called as a witness. (Indeed, he is a codefendant of O'Neill and is currently a fugitive). Just as significantly, however, Special Agent Holmes did testify that on February 13, 1995, he had spoken with Yager about the presidency of the Chicago region of the Outlaws and O'Neill's name was

mentioned in connection therewith. In other words, there was some factual basis for Yager's confronting O'Neill about Holmes' questions other than by way of the ATF having intercepted O'Neill and Suchocki's alleged conversation about O'Neill's possible interest in the regional presidency. And that factual basis occurred long before O'Neill and Suchocki's conversation.

There is yet a further reason why O'Neill's theory must be rejected. According to the testimony, the first attempt to determine whether microwaves were emitting from O'Neill's home was on February 10, 1995. At that time, no reading was obtained. Similarly, on February 13, 19, and 23, 1995, all checks for microwave emissions were negative. It was not until March 2, 1995, that Special Agent Richard Brown first detected microwave emissions. In other words, it was not until March 2, 1995, that the agents first determined that the lamp was plugged in at O'Neill's residence. Thus, even assuming that they had the capability of conducting aural monitoring with the device that they were using to detect microwave emissions (which all of us, including the agents, now know that they did), they would not have been in a position to overhear O'Neill's conversations with Suchocki about the regional presidency precisely because that conversation had already occurred three days earlier, on February 27, 1995.

This point brings me to defendant Kruppstadt's suggestion that maybe there was aural monitoring going on between February 23 and March 2, 1995, and that is why the surveillance logs make no reference to testing for a signal between those two dates. ("The lack of documented testing concerning the operation of the bugging equipment located within the O'Neill residence between February 24, 1995 and March 1, 1995 is interesting to the

extent of being suspect." [Reply Memorandum of Defendant Robert A. Kruppstadt, p.6]). This is an interesting suggestion, but one that is based entirely on speculation. More significantly, however, for me to buy into that suggestion as "fact" would require that I find DeValkenaere and Brown to be lying when they say that they did not know until this hearing that the microwave monitoring device had the capability of intercepting oral communications. It would also require that I find DeValkenaere to be lying when she says that the first conversations intercepted pursuant to Judge Evans' order occurred on the afternoon of March 22, 1995. And, simply stated, I find both DeValkenaere and Brown to have been credible witnesses whom I believe.

To be sure, there were some discrepancies in DeValkenaere's testimony. But they were minor. For example, she testified that she believed Holmes was at the agent meeting of April 21, 1995. Holmes testified that he was not.[1] Thus, DeValkenaere may have been wrong. But, DeValkenaere testified that the meeting was conducted for the purpose of preparing for up to 50 interviews over the course of two days, i.e. April 24-25, 1995. And there was a minimum of 25 law enforcement who attended this meeting. (Transcript p. 192). That she may have thought Holmes was present when he, in fact, was not, is not of

[1] More precisely, Holmes testified that he was not at any April 1995 meeting "called for the purpose of making up concoctions or stories." (Transcript p. 235). So, it is possible that there may not have been a meeting of the minds between the witness and defense counsel, based on the manner in which the question was presented.

any material significance and certainly does not show that she is to be disbelieved on the core issues of this motion.

Why O'Neill's garage door may have opened from time to time without his using his garage door opener is a mystery. Similarly, why his radar detector in his automobile pinged while he was coming out his driveway is also a mystery. I am not, however, persuaded that either of those occurrences was caused by the interception of oral communications via the bugged lamp. Indeed, both O'Neill and Suchocki testified that these odd occurrences had been noticed for sometime, even as a far back as January, 1995. And it is undisputed that the lamp was not even taken by O'Neill into his house until February 7, 1995. Moreover, it was not even plugged in, according to O'Neill and Suchocki, until approximately February 25, 1995. To somehow draw a relationship between those occurrences and the bugged lamp would, therefore, be nonsensical.

The defendants suggest that because certain reports of surveilling agents use the word "monitor" when making reference to those agents' efforts to determine if the lamp was plugged in, those agents were possibly listening to the content of conversations being picked up by the lamp. Specifically, in reports dated March 4 and 6, 1995, certain agents noted that the monitor was working. (Transcript pp. 152-154). From this the defendants jump to the conclusion that the agents were listening to conversations and not just ascertaining whether the lamp was plugged in.

To begin with, I note that these reports are dated well after O'Neill's purported conversation with Suchocki regarding the regional presidency. Thus, they offer no support for the proposition that the agents had listened in on O'Neill's conversation on February 27, 1995. More

significantly, however, both DeValkenaere and Brown testified that at no time during the course of the surveillance were they aware that the device which Brown had brought with him from St. Paul could be used to pick up conversations. And if neither the lead agent in the investigation nor the technical operations officer knew that the device could be used to overhear conversations (and, recall that to do so, an additional piece of equipment would be needed), it defies common sense that other agents would: (1) know that it could; (2) go out and obtain a set of headphones and an adapter so that they could listen in; and, (3) not tell the lead agent that they had listened in on some conversations (or, in the alternative, tell the agents that they had done so, which, of course would mean that DeValkenaere and Brown are lying). Yet, this is precisely the factual scenario the defendants urge that I conclude occurred. Simply stated, I am not persuaded that it did.

CONCLUSION

The only issue that was remanded for me to decide was whether the government agents intercepted oral communications in the O'Neill residence prior to having received court authorization to do so on March 20, 1995. Based on the testimony and exhibits introduced during the hearing conducted on this issue, I am not persuaded that they did. Accordingly, for all the reasons expressed herein and in previous recommendations, I recommend that O'Neill's motion to suppress the evidence obtained through the listening device installed in the lamp be **DENIED**.

Any objection to this recommendation must be filed with the Clerk of Court, in duplicate, within ten days of the service of the same. See 28 U.S.C. § 636(b)(1)(A), (B)

and (C) and Local Rule 13.02 and 13.03 (E.D. Wis.). Failure to file a timely objection shall result in a waiver of your right to appeal all factual and legal issues.

SO ORDERED this 24th day of May, 1999, at Milwaukee, Wisconsin.

/s/ William E. Callahan, Jr.
WILLIAM E. CALLAHAN, JR.
United States Magistrate
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN P. O'NEILL, et al.,

Defendants.

Case No. 97-CR-98

ORDER

(Filed Jul. 27, 1999)

On April 7, 1999, the court issued a decision and order resolving the fourth round of objections to Magistrate Judge William E. Callahan, Jr.'s fourth round of recommendations regarding a number of pretrial motions in this case. *See* April 7, 1999 "Round IV Order." In the fourth round of pretrial motions, Kevin O'Neill submitted documents and argument supporting his belief that the government engaged in unauthorized monitoring of a listening device placed within a lamp in his house. O'Neill claims that by using the then unauthorized monitoring device, the government obtained knowledge that he was under consideration to become the Outlaws next regional president.

Although the court had resolved the issues surrounding the legality of the so-called "bugged lamp" in its October 9, 1998 Order, *See* October 19, 1998 "Round II" order at 12-17, the court made an exception by reviewing the newly submitted evidence and then deciding that it merited a closer look. *See* April 7, 1999 "Round IV" Order

at 21-25. Therefore, the court remanded the issue to the magistrate judge for an evidentiary hearing as to "whether O'Neill's newly submitted evidence demonstrates that the government used the bugged lamp to intercept conversations or other substantive information regarding O'Neill becoming the Outlaws regional president before obtaining court authorization for the intercept." Round IV Order at 24. In an effort to expeditiously resolve the remanded issue, the magistrate held an evidentiary hearing which spanned five different days and which lasted a total of nine and one-half hours. During the course of the hearing, testimony was presented from six witnesses: Kevin O'Neill, Nanette Suchocki, Special Agent Sandra DeValkenaere, Special Agent Ronald Homes, Special Agent Richard Brown and Alfred Williams. Lawyers for two of the defendants, Kevin O'Neill and Robert Kruppstadt, participated in the hearing as the magistrate determined that those two defendants have standing to challenge the so-called "bugged lamp" evidence in question.

Following the hearing, the magistrate issued a written recommendation and order recommending that this court find that the government did not engage in unauthorized interceptions of conversations taking place within O'Neill's residence. *See* May 24, 1999 "Recommendation and Order Re: Matter Remanded by Chief Judge Stadtmueller" ("Recommendation"). Magistrate Callahan based his recommendation upon factual and credibility determinations that he made during the five day evidentiary hearing. *Id.*

Pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 13, O'Neill and Kruppstadt filed timely objections to the magistrate judge's recommended findings. *See* "Objections to the Recommendation and Order Re: Matter Remanded

by Chief Judge Stadtmueller" ("Kruppstadt's Objections"); "Defendant O'Neill's Objections to Recommendation and Order Re: Matter Remanded by Chief Judge Stadtmueller" together with an addendum ("O'Neill's Objections"). The government filed a timely response to the objections on June 22, 1999.

After reviewing the 365 page transcript of the evidentiary hearing, the court finds no reason to dispute Magistrate Callahan's factual and credibility determinations. If after a careful review of the record a "district court is satisfied with the magistrate judge's findings and recommendations it may in its discretion treat those findings and recommendations as its own." *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995) (citing *United States v. Raddatz*, 447 U.S. 667, 676 (1980)). Thus, "[t]he district court is not required to conduct another hearing to review the magistrate judge's finding or credibility determinations." *Id.* (citing *Raddtz*, 447 U.S. at 667); *see also United States v. Severson*, 49 F.3d 268, 273 (7th Cir.1995). This court agrees with the magistrate's factual and credibility conclusions and will therefore adopt those conclusions as an order of this court. "When the district judge, after reviewing the record in the light of objections to the report, reaches the magistrate's conclusions for the magistrate's reasons, it makes sense to adopt the report, sparing everyone another round of paper." *United States v. Rodriguez*, 888 F.2d 519, 521 (7th Cir. 1989).

At bottom, Magistrate Callahan found that the question of whether the government engaged in illegal listening to the bugged lamp hinges upon the credibility of the government agents who testified that no such listening took place: "In order for me to find that such interceptions occurred I must conclude that government agents who

testified at the hearing (or at least some of them) lied." Recommendation at 18. To the contrary, the magistrate found that the government witnesses testified truthfully, because although the defendants may have initially presented a *prima facie* case insinuating that the government illegally listened to transmissions from the bugged lamp, the defendants produced neither testimony nor physical evidence showing that the agents perjured themselves during the hearing. With no showing beyond their *prima facie* supposition that the government illegally intercepted conversations, the defendants fail to overcome the evidentiary record created by the government agent's testimony.

In response to O'Neill's claim that the government illegally listened to conversations that took place in his house, the government introduced an alternative explanation for the source of their implied knowledge relating to Kevin O'Neill's candidacy as the Outlaws' next regional president. Special Agent Holmes testified that on February 13, 1995, he questioned then acting Outlaws president Randy Yeager about potential candidates for the president position and that Yeager named Kevin O'Neill as one such candidate. Recommendation at 19; Transcript at 264-66. thus, Special Agent Holmes' testimony provides a legitimate conduit through which the government could have learned about Kevin O'Neill's candidacy as the Outlaws' next regional president. This explanation also provides a basis for why Special Agent Holmes began asking Outlaws members about O'Neill's candidacy as early as the first week of March 1995. Transcript at 40-43.

Special Agent Holmes' testimony creates a conflict between the defendants' and the government's explanations as to the origin of the government's knowledge of

O'Neill's candidacy. On one hand, the defendants assert that the government illegally obtained notice of O'Neill's regional president candidacy by using the bugged lamp to intercept a conversation that took place between Kevin O'Neill and Nanette Suchocki on the night of February 27, 1995. Transcript at 26-27. On the other hand, the government maintains that Special Agent Holmes first learned that information from acting president Randy Yeager on February 13, 1995. Recommendation at 19. The government also contends that it could not have realized O'Neill's candidacy through the bugged lamp because the government did not begin intercepting conversations with that lamp until the afternoon of March 22, 1995. Transcript at 178. Furthermore, the government maintains that it did not even become aware that the bugged lamp was properly emitting microwave signals until March 2, 1999, several days after the alleged O'Neill-Suchocki conversation took place. Recommendation at 19.

Despite the government agent's testimony that they did not listen to O'Neill's conversation prior to March 22, 1995, the defendants urge the court to arrive at the opposite conclusion. Both defendants argue that because they were able to find inconsistencies in the government witnesses' testimony, the court should not only disregard that testimony but should then also assume the truth of the opposite facts. However, none of the inconsistencies raised by the defendants caused the magistrate to seriously question the truthfulness of the government's testimony, and this court agrees with that conclusion. Additionally, challenging the accuracy of a witness' testimony does not necessarily create evidentiary support for an opposite contention proposed by the defendants. The magistrate addressed the defendants' attempt to prove

their arguments in this fashion by noting that those facts "are entirely based upon speculation." Recommendation at 20.

Ironically, one of the defense attorneys accurately summarized the defendants' quandary when he observed that "[t]he simple fact is that, after four (sic) days of testimony, we have no knowledge of what surveilling agents did during the course of their monitoring of the listening device planted in the O'Neill residence." Kruppstadt's Objections at 3. In the end the defendants may have faced an impossible task in striving to prove that the government wrongfully listened to conversations without authorization, because without external manifestations of the eavesdropping, the defendants cannot prove what information existed in the minds of the government agents and when that information existed.

From the extensive and complete evidence before the magistrate and before this court on review, there exists no basis to find that the government illegally monitored conversations within the O'Neill household. Therefore, the court will rely upon the government agents' credible testimony and will adopt Magistrate Callahan's recommendation in full. Finally, although both the defendants and the government also addressed collateral issues to the limited remand in this case, the court will not speak to those concerns because they have been resolved through prior orders.

Accordingly,

IT IS ORDERED that Magistrate Judge William E. Callahan Jr.'s April 7, 1999 Recommendation that the court deny O'Neill's motion to suppress the evidence obtained through the listening device installed in the lamp

be and the same is hereby **ADOPTED** as an order of this court and that O'Neill's motion to suppress that evidence be and the same is hereby **DENIED**.

Dated at Milwaukee, Wisconsin, this 29th day of July, 1999.

BY THE COURT:

/s/ J.P. Stadtmueller
J.P. Stadtmueller
Chief Judge